IN THE

Supreme Court of the United States

October Term, 1979

No. 78-6899

ROBERT FRANKLIN GODFREY,
Petitioner,

v.

THE STATE OF GEORGIA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR RESPONDENT

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CORRECTED PARAGRAPH 2 APPEARING

ON PAGE 11 OF RESPONDENT'S BRIEF

On appeal to the Supreme Court of Georgia, the Petitioner challenged the constitutionality of the death penalty, and raised numerous other issues. The Supreme Court of Georgia held: (1) The evidence was sufficient. (2) Certain photographs of the murder scene were properly admitted. (3) The motion to challenge the composition of the grand jury had been made untimely. (4) The trial court was correct in not charging on a lesser degree of homicide, namely manslaughter. (5) The motions for mistrial were properly denied by the trial court. (6) The motion for a continuance was properly denied inasmuch as counsel was appointed on September 21, 1977, but did not present the motion until February 1, 1978. (7) That both murder charges were properly tried at the same time. (8) That the motion for change of venue on the basis of pretrial publicity had not shown that the jurors summoned had formed any fixed opinions as to Petitioner's guilt or innocence from any pretrial publicity. (9) The death penalty was not unconstitutional. The Supreme Court of Georgia thus affirmed the Petitioner's convictions and sentence to death for murder. Godfrey v. State, 243 Ga. 302, 253 S.E.2d 710 (1979). This Court granted certiorari, limited to the issue of whether the Supreme Court of Georgia in affirming the death sentence in this matter had adopted such a broad and vague construction of the aggravating circumstance under which the death penalty was imposed in this case so as to violate the Eighth and Fourteenth Amendments to the United States Constitution. ___U.S.___, 62 L.Ed.2d 133 (1979).

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OPINION BELOW

The decision of the Supreme Court of Georgia is reported at *Godfrey v. State*, 243 Ga. 302, 253 S.E.2d 710 (1979), *cert. granted*, __ U.S. __, 62 L.Ed.2d 133 (1979).

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on February 27, 1979. The motion for rehearing by the Petitioner was denied on March 27, 1979. The petitioner for writ of certiorari was filed on June 25, 1979. Petitioner's application for stay of execution and enforcement of sentence of death was granted by Mr. Justice Powell on August 14, 1979. The petition was granted on October 9, 1979. Jurisdiction obtains under 27 U.S.C. § 1257(3) (1970).

QUESTION PRESENTED

In affirming the imposition of the death sentence in this case, has the Georgia Supreme Court adopted such a broad and vague construction of Ga. Code Ann. § 27-2534.1(b)(7) (specifying certain aggravating circumstances) as to violate the Eighth and Fourteenth Amendments to the United States Constitution?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional Provisions:

This case involves the Eighth Amendment:

> Excessive bail shall not be required nor excessive fines imposed nor cruel and unusual punishment inflicted.

This case also involves the Fourteenth Amendment:

> . . . [N]or shall any state deprive any person of life, liberty, or property without due process of law. . .

Statutory Provision:

This case involves the seventh aggravating circumstance of Georgia's 1973 death penalty enactment which provides:

> (7)The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.[1]

STATEMENT OF THE CASE

On the evening of September 20, 1977, in Polk County, Georgia,[2] Petitioner armed with a .20 gauge Savage rifle-shotgun combination shot to death his wife, Mildred Godfrey,[3] and his mother-

[1] The complete statute is set forth as Appendix A to this brief [hereinafter cited as "App. A at _____."]

[2] Polk County is approximately sixty miles northwest of Atlanta, Georgia.

[3] Mildred Godfrey had been the wife of Robert Franklin Godfrey for approximately twenty-eight years. (T. 363).

in-law, Chessie C. Wilkerson along with striking his eleven-year-old daughter, Tracy Godfrey, in the forehead with the barrel of his shotgun, causing a laceration to the scalp of approximately one inch. (R. 5; T. 136, 209, 210, 211).

Charged with murder[4] and aggravated assault,[5] Godfrey was tried March 6-9, 1978, in the Superior Court of Polk County.

Godfrey was found guilty of each charge on March 9, 1978. (A. 72, 73).

The sentencing phase of the trial began following lunch on the afternoon of March 9, 1978, before the same jury that returned the guilty verdicts.[6]

Evidence was introduced to show that on September 5, 1977, the Petitioner and his wife had been arguing,[7] and during that argument Mildred Godfrey told Petitioner that she was going to leave him. (T. 109, 168). The Petitioner in his own testimony characterized the tenor of this argument as being heated, compounded by the fact that he had been drinking. (T. 366).[8] During this argument on September 5, 1977, the Petitioner in order to stop his wife from leaving their home pulled out a pocketknife and told her to sit down on the couch or he would cut her. (T. 110, 168). In fact, during an earlier part of the argument Petitioner had locked himself and his wife in the bathroom to their home. (T. 166). After the argument Petitioner's wife left and stayed with other relatives until she went to live with her mother-

[4] Ga. Code Ann. § 26-1101 (1972 Rev.)

[5] Ga. Code Ann. § 26-1302 (1977 Rev.)

[6] Ga. Code Ann. § 26-3102 (1977 Rev.). The Court is familiar with this procedure used in capital cases in Georgia. *See, Gregg v. Georgia,* 428 U.S. 153, 163-166 (1976).

[7] This argument on Labor Day was over a utility bill. (T. 166, 194).

[8] The Petitioner testified that he and his wife had been previously separated and had encountered marital difficulties because of a drinking problem that he had, which led on one occasion to his wife taking out a warrant for his arrest. (T. 364). On two of the occasions that Petitioner was separated from his wife because of his drinking problems he was hospitalized. (T. 364, 365).

in-law. On the day following this argument while the Petitioner was at work, his older daughter Cathy Venable, went back to her parents home in order to get some of her mother's clothing, and while there she went into the bathroom and gathered up some clothing which included two garments that Petitioner had cut off his wife while they were arguing in the locked bathroom the day before. (T. 168).

Some time after the confrontation between Petitioner and his wife on the 5th of September, Mildred Godfrey went to Mr. Charles E. Hunt, a Justice of the Peace[9] and secured a warrant charging her husband with aggravated assault. (T. 160, 162).[10]

Two days after the altercation on September 5, 1977, Mildred Godfrey filed for divorce from the Petitioner. (T. 599). On page three of the divorce complaint in paragraph 12, Mildred Godfrey alleged that she feared for her life from the Petitioner and was afraid that he would inflict bodily harm on her unless the court restrained him. (T. 599). The hearing on the divorce complaint was set for September 22, 1977. (T. 599). Robert Godfrey was served with a copy of the complaint for divorce on September 9, 1977. (T. 599).

After Mildred Godfrey separated from her husband, she went to live with her mother, Mrs. Chessie Wilkerson, in her mother's trailer which is located several yards down the road from the Godfrey home. (T. 110-112, 172, 206). Nothing much transpired between the Petitioner and his wife from the time the divorce complaint was filed until September 20, 1979. Mildred Godfrey's daughter, Cathy Venable, did relate that following her parents separation, Petitioner told her that he would accept a divorce. (T. 172). Petitioner Godfrey, who was employed as a male nurse

[9] *See generally*, Ga. Code Ann. § 24-4, *et seq.*

[10] The record concerning whether this warrant was ever served upon Petitioner is silent, since it appears that after the warrant was issued it was given to Mrs. Godfrey, as the Justice of the Peace received no further information as to whether or not the warrant was ever executed. (T. 163).

at the Northwest Regional Hospital, Rome, Georgia, told one of his co-workers, Elizabeth Newton, on the morning of the shooting that he and his wife were getting a divorce. (T. 151, 152). Petitioner Godfrey remarked to Elizabeth Newton that by the 21st the divorce would be over with, and that he was selling his house as part of the divorce settlement. (T. 152). Elizabeth Newton also testified that based upon her observations of Petitioner Godfrey on September 20, 1977, she did not detect anything abnormal in his behavior or actions. (T. 153, 154).

On the evening of September 20, 1977, Tracy Godfrey, the Petitioner's eleven-year-old daughter was playing a game with her mother and grandmother in her grandmother's trailer. (T. 205). While playing this game Tracy heard a gunshot, and not realizing what it was at first, this young girl thought that somebody was shooting a dog. (T. 210). Almost immediately young Tracy Godfrey realized that her mother had been shot as she saw her mother's head drop,[11] and heard screams from her grandmother. (T. 210, 211). Tracy at first believed that the gunshot came from the front of the trailer, but when instructed by her grandmother to go get help she went out the back of the trailer only to be hit in the head with the end of the barrel of her daddy's shotgun. (T. 211). After being struck in the head, Tracy Godfrey managed to run to her sister's home which is several yards from the grandmother's trailer. (T. 211). Tracy Godfrey further testified that as she was running to her sister's house she heard another gunshot followed by screams from her grandmother which was then followed by another shot. (T. 212).

Upon hearing the gunshots the Petitioner's older daughter, Cathy Venable, noticed her younger sister Tracy running from the back of the trailer, and once Tracy came into her home she closed the doors, locked them and called the police. (T. 177, 178). It was not until the police arrived that Cathy Venable noticed that her father was sitting in a lawn chair in her front yard. (T. 178).

[11] Tracy Godfrey in describing the direction that the first shot was fired from also noted that she saw a shell on the table and gun powder. (T. 213).

Evidence was also introduced from Carl Rice, the county jailer, that on the evening of September 20, 1977, he received a phone call from Godfrey, in which Godfrey told him that he had blown his wife and mother-in-law's heads off and to send the sheriff for him. (T. 198).

When the Polk County Police arrived at the scene of the homicides they observed Petitioner Godfrey sitting in a chair under a tree approximately fifty yards from Chessie Wilkerson's trailer. (T. 215). Godfrey called over to Police Officer Seals Minchew who was approaching him as he was seated in a chair and told him that there was no use in going into the trailer in that they were dead, and that he had killed them. (T. 215, 216). Petitioner Godfrey then proceeded to take Officer Minchew to an apple tree approximately fifty yards away from where he was sitting, and in the fork of the tree he had placed the shotgun. (T. 216). The weapon was then inspected by Officer Minchew, and found to be empty. (T. 217).

When Petitioner Godfrey was placed in a patrol car he was told by Polk County Sheriff Seals Swafford that he would be in the custody of the county police. (T. 275). Godfrey responded by telling Sheriff Swafford that everything had been taken care of, that it was over with, and that they were in there. (T. 275). Later on at the county police offices Petitioner Godfrey stated to County Patrolman James McLendon, "Mack, I've done a hideous crime, but I have been thinking about it for eight years, I'd do it again." (T. 239, 240). At the time Petitioner Godfrey made this statement he appeared to be calm and collected. (T. 239). In fact, at the time Petitioner Godfrey was first confronted by law enforcement officers following the shootings he did not appear to be upset, agitated or intoxicated. (T. 227, 228, 232, 234, 235, 241, 243).[12]

[12] Petitioner Godfrey's daughter, Cathy Venable had testified that when her daddy was drinking he was mean, but that several days before the shooting she observed three cans of beer in the refrigerator, and that each time she looked in the refrigerator, to and including a day or so following the shooting the same three cans of beer were in the refrigerator. (T. 182, 187, 188).

The murder scene inside the trailer can only be described as one of vile horror. Mildred Godfrey's body was discovered on the floor of her mother's trailer, with a hole the size of a silver dollar in her forehead and the back portion of her head broken up apparently from the shotgun blast which passed through her head leaving pellets imbedded in the kitchen cabinets. (T. 218, 219, 259). There was a hole in the screen of a window facing the kitchen area off the carport to the trailer. (T. 261). Mildred Godfrey's mother, Mrs. Chessie Wilkerson, was likewise found lying on the floor of her trailer, face down, with the top part of her head missing. (T. 258, 265). In the living room area of the trailer officers found what appeared to be the top part of her skull while portions of her brain protruded approximately a foot and one-half from her head.[13] (T. 265). There was a great deal of blood on the ceiling, and a good deal of it was dripping from the ceiling to the floor. (T. 273). The fatal wounds were inflicted from a shotgun as is evidenced by the fact that an expended shell was found under the kitchen table, another shell in the trailer carport and three live shells were found outside the trailer along a fence. (T. 218, 247, 253, 256, 268, 277, 278).

In defense of these charges Petitioner Godfrey claimed that at the time of the shootings he was insane. To support this defense Petitioner Godfrey presented the testimony of Doctor William S. Davis, a psychiatrist who had formerly treated Petitioner for alcohol abuse and depression. (T. 306, 307). In his testimony on behalf of Petitioner, Doctor Davis related that he had examined the Petitioner in February of 1978 pursuant to a court

[13] The medical examinations that were performed on the two bodies revealed that Mildred Godfrey had a wound some three and one-half to four inches wide in her forehead, and that Mrs. Wilkerson had lost a considerable amount of bone and soft tissue, skin and hair above the right ear. (T. 289, 290). The medical examinations established that both women died from gunshot wounds to the head with resulting brain damage. (T. 290, 292).

order. (T. 307). Doctor Davis' testimony indicated that Petitioner was so upset because his wife refused any attempts at reconciliation that he suffered a dissociative attack, which resulted in forgetting all events concerning the shootings.[14] (T. 312, 313). Doctor Davis further testified that Petitioner Godfrey might have known right from wrong while in such a state, but that he would be unable to control his actions to prevent his doing wrong. (T. 324). Doctor Davis attempted to support this finding by relating that he had injected Petitioner Godfrey with a drug called Amytal, but that the results of the injection were not as good as he would have liked for them to have been. He still proceeded to go ahead with the interview. (T. 328, 329).

To rebut Godfrey's contention that he was insane at the time of the shootings, the state called Doctor Robert Wildman, a clinical psychologist at Central State Hospital, Milledgeville, Georgia and Doctor Carl Smith, a psychiatrist at Central State Hospital.[15] Both of these witnesses for the State testified that Petitioner Godfrey manifested no symptoms of abnormal behavior, had no history of psychosis or insanity, nor did he have any organic brain damage or exhibit any abnormal behavior. (T. 432, 476, 478, 480). This testimony is indicative of the fact that Godfrey's behavior and thinking are not those which are normally associated in cases of psychosis. (T. 480). Both Doctor Wildman and Doctor Smith concluded that Godfrey's actions and performance were on a conscious level without any sort of mental illness and that he was able to distinguish between right and wrong and could hear and follow that which was morally right had he decided to do it at the time of the killings. (T. 485, 486). Furthermore, Doctor Wildman gave testimony which indicated that Godfrey during his testing was either uncooperative, or was trying to appear more disturbed than he actually was. (T. 435).

[14] It should be noted that Doctor Davis in his testimony stated that the validity of a diagnosis of a dissociative state is based upon the truthfulness of the statements which the individual under examination provides to him. (T. 335).

[15] Central State Hospital is the main state facility in middle Georgia where individuals are examined to determine their competency to stand trial, as well as their ability to distinguish right from wrong at the time of the offense.

The State had also presented testimony from other individuals who had observed Petitioner Godfrey either before the shootings or immediately thereafter, and these individuals expressed opinions that Robert Godfrey was sane and able to distinguish between right and wrong. (T. 141, 153, 200, 228, 229).

In his testimony to the jury Robert Godfrey stated that on three occasions his wife had him committed for drinking problems. (T. 364).[16] Godfrey fully admitted that on September 5, 1977, he and his wife had been arguing, but he denied making any threats to his wife with a knife, claiming instead that he could not recall his ever doing this on the 5th of September. (T. 366). Petitioner Robert Godfrey further testified that on each of the three occasions following his being hospitalized for drinking his wife had agreed to take him back, but on this last occasion following their argument of September 5, 1977, she refused to consider it. (T. 367, 368).

Concerning the day of the shootings, Petitioner Robert Godfrey testified that he called his mother-in-law to ask her to have his wife call him back. (T. 371). When Mildred Godfrey called Petitioner back she informed him that she wanted all the proceeds from the sale of their house, a matter which Petitioner found unsuitable. (T. 373). Mrs. Godfrey told Petitioner that she would call him back, and when she did they continued to argue, during which time she reminded the Petitioner that the divorce proceedings would be coming up in court on the 22nd, and that things would be settled at that time. (T. 374, 375, 376). The last thing that Petitioner Godfrey said he recalled remembering was hanging up the telephone after talking with his wife, followed by his waking up in the county jail on September 21, 1977. (T. 376).

[16] These occasions were in 1950, 1966 and 1971. (T. 364).

The verdict was guilty of murder on both counts, and guilty on the charge of aggravated assault. (A. 72; T. 566).

In the punishment phase of the trial, argument was made to the jury without the tendering of any further evidence. (T. 568-577). In its instruction concerning punishment, the Court told the jury that it was their duty to fix the punishment concerning the two murder counts. (T. 577). The jurors were instructed that the authorized punishments for murder were "death or by imprisonment for life." (T. 577).

The court told the jury to determine whether there was a statutory aggravating circumstance present beyond a reasonable doubt; the court told the jury that the aggravating circumstance which they could consider was "that the offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;" and, that if the jury did not find an aggravating circumstance beyond a reasonable doubt they would fix the punishment at life imprisonment, and even though they found to be present a statutory aggravating circumstance they could nevertheless recommend a life sentence. (T. 578). The court also explained:

> Mitigating circumstances are those which do not constitute a justification or excuse for the offense in question but which in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability or blame. Aggravating circumstances are those which increase the guilty or enormity of the offense, or add to its injurious consequences.
>
> * * *
>
> In determining a verdict in this case you shall consider any mitigating circumstances which you find, and you may consider any of the following aggravating circumstances which may be supported by the evidence. (T. 578).

The jury found the presence of the statutory aggravating circumstance submitted and imposed the death penalty on each count. (A. 80, 81; T. 580).

On appeal to the Supreme Court of Georgia, the Petitioner challenged the constitutionality of the death penalty, and raised numerous other issues. The Supreme Court of Georgia held: (1) The evidence was sufficient. (2) Certain photographs of the murder scene were properly admitted. (3) The motion to challenge the composition of the grand jury had been made untimely. (4) The trial court was correct in not charging on a lesser degree of venue on the basis of pretrial publicity had not shown that were properly denied by the trial court. (6) The motion for a continuance was properly denied inasmuch as counsel was appointed on September 21, 1977, but did not present the motion until February 1, 1978. (7) That both murder charges were properly tried at the same time. (8) That the motion for change of venue on the basis or pretrial publicity had not shown that the jurors summoned had formed any fixed opinions as to Petitioner's guilt or innocence from any pretrial publicity. (9) The death penalty was not unconstitutional. The Supreme Court of Georgia thus affirmed Petitioner's convictions and sentence to death for murder. *Godfrey v. State,* 243 Ga. 302, 253 S.E.2d 710 (1979). This Court granted certiorari, limited to the issue of whether the Supreme Court of Georgia in affirming the death sentences in this matter had adopted such a broad and vague construction of the aggravating circumstance under which the death penalty was imposed in this case so as to violate the Eighth and Fourteenth Amendments to the United States Constitution. __ U.S. __, 62 L.Ed.2d 133 (1979).

SUMMMARY OF ARGUMENT

I.

In reponse to *Furman v. Georgia,* 408 U.S. 238 (1972), the General Assembly of Georgia enacted a new death penalty statute. An essential aspect of this legislative enactment is the automatic appellate review by the Supreme Court of Georgia which examines the imposition of the death penalty in three specific areas. The review by the Supreme Court of Georgia further controls the individual sentencing characteristics of the 1973 Death Penalty Act. The Petitioner's sentence to death conforms to the requirement that the death penalty be imposed in especially serious crimes, second that the sentence is not rarely imposed for such a crime, and finally, that the sentence does not contain any arbitrariness or discrimination. Petitioner's sentence falls within the ambient class of those who callously and cold-bloodedly plan the execution of their adversaries, and on whom such sentences to death are consistently imposed. The review by the Supreme Court of Georgia in the Petitioner's case is in conformity with the mandate of the 1973 death penalty enactment.

II.

In examining the Petitioner's sentence to death under the seventh aggravating circumstance of Georgia's death penalty statute, the Supreme Court of Georgia has not adopted such a vague or overly broad interpretation of that particular aggravating circumstance, since it has consistently held that the essential statutory language is that which was found by the jury in the Petitioner's case. The remaining language in the seventh aggravating statutory circumstance is merely illustrative language, which a finding standing alone would render it subject to vagueness. However, the jurors' finding of the statutory wording that each murder was "outrageously or wantonly vile, horrible or inhuman," is language which has been defined by the Supreme Court of Georgia, and is language which is readily capable of

understanding by the average juror. The jurors' finding in this matter is not a partial finding, neither is the interpretation given to the jurors' finding in this case overly broad or vague so as to violate either the Eighth or Fourteenth Amendments.

III.

The punishment of death for the double execution style murders of the Petitioner's wife and mother-in-law is not disproportionate in relation to the crimes for which it is imposed, and neither is it disproportionate in that the death penalty has been consistently imposed upon those individuals who callously plan the execution of their adversaries.

I.

THE SUPREME COURT OF GEORGIA HAS CONSISTENTLY SINCE 1973 ENGAGED IN A MEANINGFUL APPELLATE REVIEW OF THOSE CASES INVOLVING THE DEATH PENALTY.

In 1973 the General Assembly of Georgia in response to this Court's decision in *Furman v. Georgia,* 408 U.S. 238 (1972), enacted a death penalty statute which controlled the conditions under which the death penalty could be sought and applied. Ga. Laws 1973, p. 159. An essential component of this legislation was the appellate review procedure to be undertaken by the Supreme Court of Georgia.[17] The review to be undertaken by the Supreme Court of Georgia is basically a three-pronged examination to insure that the evidence supports the existence of the statutory aggravating circumstance under which the death penalty was imposed; to insure that the sentence was not imposed under any arbitrary influence such as passion or prejudice; and third, that the sentence is proportionate to the crime in that for similar types of conduct the death penalty has been imposed. As

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[17] Appendix A to this brief sets out the detailed review to be undertaken by the Supreme Court of Georgia.

of the date of the writing of this brief the Supreme Court of Georgia has reviewed some ninety-nine cases in which the death penalty has been imposed. Of these ninety-nine cases, sixty-six have been affirmed, five have been reversed for errors in the guilt phase, and twenty-two have been reversed on the sentencing phase.[18]

Additionally, this Court has reversed six cases concerning errors in the sentencing phase.[19]

In capital cases the Eighth Amendment requires a consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the death penalty. *Woodson v. North Carolina,* 428 U.S. 280, 304 (1976). The 1973 death penalty statute in Georgia is responsive to such Eighth and Fourteenth Amendment requirements. *Gregg v. Georgia,* 428 U.S. 153, 189 (1976). To insure that the sentencing decision is fully informed, taking into consideration the characteristics of the defendant and the crime, the fail-safe device against aberrant death sentences is afforded by the appellate review process in the Georgia death penalty legislation, a mechanism which amounts to a reevaluation of the sentencing decision. Ga. Code Ann. § 27-2537. This review procedure by the Supreme Court of Georgia specifically requires the court in conducting its review to have as a part of its opinion a separate discussion of the sentence, and that the court shall hire a staff to assemble data regarding the appropriateness of the sentence, as well as including in its finding reference to decisions in which the

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[18] Appendix B to this brief contains a listing of all of the death penalty cases in Georgia to date, and the basis and circumstance under which the death penalty has either been affirmed or reversed.

[19] *Coker v. Georgia,* 433 U.S. 584 (1977); *Eberheart v. Georgia,* 433 U.S. 917 (1977); *Hooks v. Georgia,* 433 U.S. 917 (1977); *Davis v. Georgia,* 429 U.S. 122 (1976); *Presnell v. Georgia,* 439 U.S. 14, 99 S.Ct. 235, 58 L.Ed.2d 207 (1978); *Green v. Georgia,* ___ U.S. ___, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979).

death penalty had been imposed in similar cases. Ga. Code Ann. § 27-2537(e)(g).

Thus, the appellate review procedure in the 1973 death penalty legislation eliminates as far as humanly possible the risk of arbitrary, freakish or discriminary decisions in a capital case. In fact, this Court in *Gregg,* specifically held that the Georgia statute does limit unchecked discretion at both the sentencing and appellate stages. *Id.* at p. 206. This Court's confidence in the Supreme Court of Georgia in carrying out its mandated at appellate review was commented upon in *Gregg, supra* at p. 207 (plurality opinion), and has not gone unheeded, nor has the Supreme Court of Georgia taken its appellate review responsibility for granted by sitting back and taking a rubber stamp approach in its reviews. *See Proffitt v. Florida,* 428 U.S. 242, 255 (1976).

Petitioner argues that the Supreme Court of Georgia has not adhered to its sentencing responsibilities as initially found by this Court in *Gregg. Id.* at pp. 204-206 [plurality opinion] (Petitioner's Brief at pp. 50-51). Petitioner argues that the Supreme Court of Georgia has adopted a vague and broad construction of its appellate review functions, which is exemplified by its apparent refusal to require that in the sentencing phase of the proceedings that the trial court enumerates specific examples of mitigating circumstances in a particular case. (Petitioner's Brief at p. 51). In upholding the death penalty in Georgia, this Court in the plurality opinion in *Gregg* specifically noted that juries in this State are permitted to consider any mitigating circumstance. *Id.* at p. 206. Furthermore, in *Lockett v. Ohio,* 438 U.S. 586 (1978), this Court specifically noted, "(that the Georgia Legislature had decided to permit the jury to dispense mercy on the basis of factors too intangible to write into a statute. *Gregg,* 428 U.S. at 222 . . .)" *Lockett v. Ohio,* 438 U.S. at 606, f.n. 14.

The Supreme Court of Georgia's interpretation of the Georgia General Assembly's intention not to limit what could be considered as mitigating evidence is further set forth in *Spivey v.*

State, 241 Ga. 477, 479, 246 S.E.2d 288 (1978). In *Proffitt* this Court approved the Florida statute which specifically lists mitigating circumstances under the belief that this list was not exclusive. *Id.* at p. 250, f.n. 8. *See also, Lockett v. Ohio*, 438 U.S. at 606. The Texas statute does not even contain a reference to mitigating factors *Jurek v. Texas*, 428 U.S. 262 (1976). Petitioner's argument that the seventh aggravating circumstance is subject to such a broad and vague construction because jurors are not given specific examples of mitigating circumstances is directly contrary to the position taken by this Court in *Lockett v. Ohio, supra*, in which this Court struck down the Ohio death penalty procedure because it limited the mitigating factors which could be considered by the jury. *Lockett* requires individualized consideration of mitigating circumstances, but does not require that the jurors' discretion be channelled or limited to what mitigating circumstances can be submitted. *Id.* at 608.

Having jurors specifically informed as to what are the mitigating circumstances, would tend to limit consideration of other mitigating circumstances, for it would focus directly on those which were enumerated during the court's instructions, and could tend to overshadow other matters which jurors might consider as mitigating. Petitioner's argument that the seventh aggravating circumstance is subject to vagueness or overbreadth on appellate review because of the absence of a listing of the specific mitigating circumstances is inconsistent with this Court's holdings in *Gregg, Proffitt* and *Lockett*. The enumeration of specific mitigating circumstances has nothing to do with whether the seventh aggravating circumstance of the Georgia Death Penalty Act has been applied too broadly in this instance or whether too vague a construction has been given to that language. As will be discussed later on in this brief, the Petitioner's contention on page 51 of his brief deals more with the question of proportionality than it does with vagueness and overbreadth.

Petitioner argues that the narrowing or channelling of jury discretion is required in the area of mitigating evidence. Again

this is a view which does not square with *Lockett*, since it is the State of Georgia's understanding that in the area of mitigation wide latitude should be given to an accused, and that the channelling to narrow the jury's discretion is to be in terms of the aggravating circumstance, not relevant mitigating factors. *Green v. Georgia*, __ U.S. __, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979); *Lockett v. Ohio, supra*, at 606.[20]

The Supreme Court of Georgia has not hesitated to vacate a death sentence under its appellate review function where it finds the sentencing procedures were defective.[21] The Supreme Court of Georgia in its reviews has looked to insure that the jury's discretion is channelled so that sentencing which results in the death penalty results to the most abhorrent crimes. Two decisions by the Supreme Court of Georgia which reflect the Court's concern that jurors are fully instructed before they impose the death sentence as to their duty to consider mitigating evidence, and that there be some definition of mitigating evidence is found in *Hawes v. State*, 240 Ga. 327, 238 S.E.2d 418 (1977), and in *Fleming v. State*, 240 Ga. 142, 240 S.E.2d 828 (1977), in which the Supreme Court of Georgia specifically said that jurors must be instructed that even though they find the existence of a statutory aggravating circumstance they still could impose a life sentence.[22]

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[20] *See also, Gates v. State*, _____ Ga. _____ (Decided Oct. 24, 1979, No. 35053); *Cobb v. State*, 244 Ga. 344, 359 (1979); *Spivey v. State, supra; Thomas v. State*, 240 Ga. 393, 401, 402, 242 S.E.2d 1 (1977); *Potts v. State*, 241 Ga. 67, 243 S.E.2d 510 (1978); *Brown v. State*, 235 Ga. 644, 220 S.E.2d 922 (1975).

[21] *Gregg v. State*, 233 Ga. 117, 210 S.E.2d 659 (1974), 428 U.S. 153 (1976) [no death penalty for armed robbery.] *See also*, cases contained in Appendix B to this Brief.

[22] *See also, Spraggins v. State*, 240 Ga. 759, 243 S.E.2d 20 (1978); *Davis v. State*, 240 Ga. 763, 243 S.E.2d 12 (1978); *Redd v. State*, 240 Ga. 753, 242 S.E.2d 628 (1978); *Bowen v. State*, 241 Ga. 492, 246 S.E.2d 322 (1978); *Burger v. State*, 242 Ga. 28, 247 S.E.2d 834 (1978); *Stevens v. State*, 242 Ga. 34, 247 S.E.2d 838 (1978).

The Supreme Court of Georgia has also reversed the imposition of the death penalty where the prosecutor has made an improper comment during his argument to the jury in the sentencing phase of the trial. *Prevatte v. State,* 233 Ga. 929, 214 S.E.2d 365 (1975); *Jordan v. State,* 233 Ga. 929, 214 S.E.2d 365 (1975). Where the defendant was refused permission to testify in mitigation in the punishment phase of the trial as to why he shot the victim, the Supreme Court of Georgia reversed the trial court's decision for improperly limiting the type of mitigation evidence which could be presented. *Brown v. State,* 235 Ga. 644, 220 S.E.2d 922 (1975). In *Sprouse v. State,* 242 Ga. 831 (1979), the death sentence was set aside because of the failure of the jurors to specify which aggravating circumstance they found beyond a reasonable doubt in imposing the death sentence. In the case of *Holton v. State,* 243 Ga. 312, 253 S.E.2d 736 (1979), the sentence to death was set aside because in considering the seventh aggravating circumstance the jury imposed the sentence of death upon a finding of "depravity of mind." The Supreme Court of Georgia in its opinion held that this was a partial finding of the seventh statutory aggravating circumstance subject to vagueness. *Id.* This decision is consistent with the Court's earlier holding in *Harris v. State,* 237 Ga. 718, 730 (1976), that the words "depravity of mind," "torture" and "aggravated battery" were illustrative words and that the essential statutory language is "outrageously or wantonly vile, horrible or inhuman." Ga. Code Ann. § 27-2534.1 (b) (7). Further evidence of the seriousness with which the Supreme Court of Georgia has undertaken its appellate review is found in the cases of *Owens v. State,* 233 Ga. 829, 214 S.E.2d 173 (1975) and *Griggs v. State,* 241 Ga. 317, 320, 245 S.E.2d 269 (1979), concerning the question of whether a proposed venireman was excused in violation of *Witherspoon v. Illinois,* 391 U.S. 510 (1968). In the case of *Stack v. State,* 234 Ga. 19, 214 S.E.2d 514 (1975), the death penalty was set aside because of an error in admitting testimony of a polygraph operator, as well as the Supreme Court of Georgia's noting that the trial judge's report

contained an indication that the evidence did not foreclose all doubt. *Id.*

Additional evidence of the dedication and serious application by the Supreme Court of Georgia to its review function is found in the case of *Hall v. State,* 241 Ga. 252, 244 S.E.2d 833 (1978), where the sentence to death was set aside because of the co-defendant who was the triggerman received a life sentence. Likewise, in the case of *Arnold v. State,* 236 Ga. 534, 224 S.E.2d 386 (1976), the Supreme Court of Georgia found that the statutory aggravating circumstance which permits the implementation of the death penalty where a homicide is perpetrated by an individual who has a "substantial history of serious assaultive criminal convictions," to be unconstitutional. *See,* Ga. Code Ann. § 27-2534.1(b)(1).

Petitioner also attacks the adequacy of the appellate review process by the Supreme Court of Georgia, stating that the cases listed in the appendix to his case in the opinion by the Supreme Court of Georgia, when considering the factual circumstances, the background, the accused's mental state and the mitigating circumstances bear "no real similarity to the fifteen cases listed." (Petitioner's Brief at p. 45). In *Moore v. State,* 233 Ga. 861, 864, 213 S.E.2d 829 (1974), *cert. den.,* 428 U.S. 910, *rehng. den.,* 492 U.S. 873 (1976), the Supreme Court of Georgia specifically commented upon its review responsibilities under Ga. Code Ann. § 27-2537 (c)(3), concerning "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." In *Moore,* the Supreme Court of Georgia held as follows:

> Appellant cites two trials, not a part of the record of this trial, which he alleges are similar to the facts in the instant case wherein the death sentence was not imposed. Although they were not considered by the trial judge and cannot be considered by this court, some comment is appropriate concerning this Court's duty to compare the sentence in this

> case with that imposed in similar cases. As we view the court's duty in light of *Furman* and *Jackson* cases and the statutory provisions designed by the Georgia Legislature to meet the objections of those cases, ***this court is not required to determine that less than a death sentence was never imposed in a case with some similar characteristics.*** On the contrary, we view it to be our duty under the similarity standard to insure that no death sentence is affirmed unless in similar cases throughout the state the death penalty has been imposed generally and not 'wantonly and freakishly imposed,' as stated by Justice Stewart in his concurring opinion in the *Furman* and *Jackson* cases (408 U.S. 238, 310), *supra.* (Emphasis added).

See, Gregg v. Georgia, supra, 204, f. n. 56. Thus, the measuring rod is whether "juries generally throughout the state have imposed the death penalty." *Jarrell v. State,* 234 Ga. 410, 216 S.E.2d 258 (1975), *cert. den.,* 428 U.S. 910, *rehng. den.,* 429 U.S. 873 (1976).

In making the assertion that the Supreme Court of Georgia in its appellate review has failed to consider similar cases, the State of Georgia is thus led to believe that the Petitioner would deny that the double shotgun murders of his wife and mother-in-law cannot be characterized as execution style killings, or that they were premeditated in nature. To the contrary, the State of Georgia believes that these homicides were execution murders, and that they were premeditated, callous and cold-blooded killings. The cases contained in the appendix of similar cases relied upon by the Supreme Court of Georgia in upholding Petitioner's sentence to death are similar, in that of those cases thirteen involved cold-blooded or premeditated execution style killings.[23]

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[23] *Gregg v. State,* 233 Ga. 117, 210 S.E.2d 659 (1974), 428 U.S. 153 (1976); *Floyd v. State,* 233 Ga. 280, 210 S.E.2d 810 (1974), *cert. den.,* 431 U.S. 949, *rehng. den.,* 434 U.S. 882 (1977); *Chenault v. State,* 234 Ga. 216, 215 S.E.2d 233 (1975), *cert. den.,* 434 U.S. 878, *rehng. den.,* 434 U.S. 976 (1977); *Smith v. State,* 236 Ga. 12, 222 S.E.2d 308 (1976),

Ten of those cases involved anticipation of death by the murder victims much like this case where one victim was shot first; the mother-in-law dying shortly after the horrible realization that she too would be put to death.[24] One of the cases in the *Godfrey* Appendix involved the slaying of a former spouse and his new wife which is indicative of the death penalty being invoked for a so called "domestic slaying."[25] Each of the cases cited in the Appendix to the *Godfrey* decision are illustrative of murders being outrageously or wantonly vile, horrible or inhuman.[26]

To support his contentions that the appellate review procedure is inadequate in this instance, Petitioner has attached as an appendix to his brief a police report concerning a double homicide caused by an estranged husband to his wife and her lover. As noted in *Ross v. State,* 233 Ga. 361, 366 (1974), the Supreme Court of Georgia stated, "That nothing in the statute forecloses this court during the course of its independent review of examining non-appealed cases and cases in which the defendant pleaded guilty to a lesser offense." *See also, Gregg,* at p. 204, f.n. 56. The

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cert. den., 429 U.S. 952, *rehng. den.,* 429 U.S. 1055 (1977); *Birt v. State,* 236 Ga. 815, 225 S.E.2d 248 (1976), *cert. den.,* 429 U.S. 1029 (1976); *Gaddis v. State,* 239 Ga. 238, 236 S.E.2d 594 (1977), *cert. den.,* 434 U.S. 1088, *rehng. den.,* 435 U.S. 981 (1978); *Coleman v. State,* 237 Ga. 84 (1976), *cert. den.,* 431 U.S. 909, *rehng. den.,* 431 U.S. 961 (1977); *Issacs v. State,* 237 Ga. 105, 226 S.E.2d 922 (1976), *cert. den.,* 429 U.S. 986 (1976); *Dungee v. State,* 237 Ga. 218, 227 S.E.2d 746 (1976), *cert. den.,* 429 U.S. 986 (1976); *Banks v. State,* 237 Ga. 325, 227 S.E.2d 380 (1976), *cert. den.,* 430 U.S. 975 (1977); *Young v. State,* 239 Ga. 53, 236 S.E.2d 1 (1977), *cert. den.,* 434 U.S. 1002, *rehng. den.,* 434 U.S. 1051 (1978); *Westbrook v. State,* 242 Ga. 151, 249 S.E.2d 524 (1978), *cert. den.,* _____ U.S. _____, 99 S.Ct. 881, 59 L.Ed. 63 (1979); *Finney v. State,* 242 Ga. 582, 250 S.E.2d 388 (1978), *cert. den.,* _____ U.S. _____, 99 S.Ct. 2017, 60 L.Ed. 388 (1977).

[24] *House v. State,* 233 Ga. 140, 205 S.E.2d 217 (1974), *cert. den.,* 428 U.S. 910, *rehng. den.,* 429 U.S. 873 (1976); *Floyd, supra; Birt, supra; Coleman, supra; Issacs, supra; Dungee, supra; Banks, supra; Peek v. State,* 239 Ga. 422, 238 S.E.2d 12 (1977), *cert. den.,* _____ U.S. _____, 99 S.Ct. 218 (1978); *Westbrook, supra; Finney, supra.*

[25] *Smith v. State, supra.*

[26] *Banks, supra.*

important aspect is to keep in mind the fact that in *Ross, supra,* the Supreme Court of Georgia stated: "The comparative sentence review 'is designed to aid this court's determination of how prior sentencers have responded to acts similar to those committed by the defendant whose case is being reviewed. It is the reaction of the sentencer to the evidence before it which concerns this court and which defines the limits which sentencers in past cases have tolerated, whether before or after *Furman v. Georgia.* When a reaction is substantially out of line with reactions of prior sentencers, then this Court must set aside the death penalty as excessive.' " *Id.* at pp. 366-367.

The case cited in Appendix B to the Petitioner's Brief while concerning a double homicide, is a case in which the defendant had been drinking, and had just come from court following a divorce having been granted. Moreover, this case involved a negotiated plea. *See e.g., Brady v. United States,* 397 U.S. 742 (1969). In addition, this case does not involve premeditated murder.

The appellate review procedures in the death penalty statute passed in 1973 by the Georgia General Assembly insures a careful appellate review of each death sentence to insure its constitutionality. First, the sentence must be in an authorized category; secondly, it cannot be arbitrary; and lastly, it cannot be disproportionate to the punishment imposed in similar cases upon similar defendants. Petitioner has failed to show that the seventh aggravating circumstance under which his death penalty was imposed is incapable of a meaningful appellate review, or that in his case the Supreme Court of Georgia has not adhered to its duties legislated to it by the General Assembly of Georgia.

II.

THE SUPREME COURT OF GEORGIA HAS NOT ADOPTED AN OPEN-ENDED APPLICATION OF THE AGGRAVATING CIRCUMSTANCE UNDER WHICH PETITIONER WAS SENTENCED TO DEATH.

The State of Georgia sought the death penalty against the Petitioner for the execution style double shotgun slayings of his wife and mother-in-law under the seventh aggravating circumstance contained in Georgia's 1973 death penalty statute, which reads:

> The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. Ga. Code Ann. § 27-2534.1(b)(7)

Initially it should be noted that Petitioner attacks in his brief the facial constitutionality of the seventh aggravating circumstance, (Petitioner's Brief at p. 41). However, this Court in *Gregg* rejected the attack that the seventh statutory aggravating circumstance was so vague or overly broad that it could be applied to just about any homicide.[27] In *Gregg* this Court held that in reviewing the seventh aggravating circumstance it found that the "vagueness" and "overbreadth" argument did not render this circumstance to be invalid under the Eighth and Fourteenth Amendments since it was capable of having capital punishment instituted other than by arbitrariness or capriciousness. *Gregg* at pp. 200-201, f.n. 51. The question upon which certiorari was granted in this case is whether in *this case* the Supreme Court of Georgia has taken such a broad and vague approach to the construction of the seventh aggravating circumstance so that it amounts to a violation of the Eighth and Fourteenth Amendments. (Emphasis added). The State of Georgia submits that in this case, and in the other cases decided under Ga. Code Ann. § 27-2534.1(b)(7), the Supreme Court of Georgia has not

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[27] *Gregg, supra,* 428 U.S. at 201 (plurality opinion).

adopted an overly broad or vague construction to this seventh statutory aggravating circumstance. Since the enactment of the 1973 death penalty statute in Georgia there have been forty-three cases including that of the Petitioner upon which the sentence of death has been imposed under the seventh aggravating circumstance either alone or in combination with another statutory aggravating circumstance. (*See*, Appendix B to Respondent's Brief). At the time that this Court decided *Gregg*, 428 U.S. 153, there was only one death penalty case which had been affirmed by the Supreme Court of Georgia solely predicated upon the seventh aggravating circumstance. *See, McCorquodale v. State*, 233 Ga. 369, 211 S.E.2d 577 (1974).[28]

Since this Court's decision in *Gregg* there have been ten death penalty cases in which the only aggravating circumstance found was that which is contained in Ga. Code Ann. § 27-2534.1(b)(7).[29] Over the past six years the Supreme Court of Georgia has specifically commented upon its review under the seventh statutory aggravating circumstance in terms of arguments that this circumstance is more likely to be subjected to an open-ended interpretation, or would be permitted to be a "catch-all" situation when no other aggravating circumstance exists. *Gates v. State*, *supra*, f.n. 20; *Banks v. State*, 237 Ga. 325, 227 S.E.2d 380 (1976); *Harris v. State*, 237 Ga. 718, 230 S.E.2d 1 (1976); *Hill v. State*, 237 Ga. 794, 229 S.E.2d 737 (1976); *Holton v. State*, 243 Ga. 312, 253 S.E.2d 736 (1979); *Ruffin v. State*, 243 Ga. 95, 252 S.E.2d 479, *cert. den.*, __ U.S. __ (December 10, 1979).

Before examining what the Supreme Court of Georgia has said in regard to its interpretation and application of the seventh aggravating circumstance, the question of breadth and vagueness in its implementation in this case should be addressed. Petitioner has asserted that the jury's finding that the murder was outrageously or wantonly vile, horrible or inhuman is a partial, in-

[28] *Gregg*, 428 U.S. at 201.
[29] *See*, Appendix B to Respondent's Brief.

complete and uncertain finding of the seventh aggravating circumstance which renders it so broad so as to violate the Eighth and Fourteenth Amendments. (Brief of Petitioner at p. 20).

The spirit of the review procedure embodied in Ga. Code Ann. § 27-25 is accomplished by the Supreme Court of Georgia when it examines the evidence in a particular case to determine not only whether the evidence supports the aggravating circumstance returned by the jury, but also whether in similar situations jurors have returned the death penalty. Similar circumstances would include such things as *mens rea*, the nature of the wounds, the nature of the weapon used, and whether there was any planning, or predisposition to murder by the defendant. Similar circumstances are not to be limited in this instance to so called pure "domestic homicides," because in this case while the victim and perpetrator were family, the murders here were not the result of a sudden and irresistible impulse generated in the heat of passion[30] generated by a state of high emotional tensions building up to a crescendo immediately preceding the killings which typify the course of events in most domestic homicides. The facts in this case necessarily warranted the Supreme Court of Georgia in its review to look at and consider during its appellate review those cases which evidenced a predisposition on the part of a defendant to not only inflict grievous bodily injury, but an intent to murder. *Sub judice*, the facts clearly reveal that Petitioner planned these homicides, and had intended to reach the results he achieved on September 20, 1977, for some time. Under the facts contained herein and the list of similar cases considered by the Supreme Court of Georgia cited in the appendix to its decision it cannot be concluded that the affirmation of Petitioner's sentence was the result of an "ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. Rockford*, 408 U.S. 104, 109 (1972).

The affirmation of Petitioner's sentences were not result orien-

[30] *See*, Ga. Code Ann. § 26-1102 (Rev. 1977), which concerns murders which arise out of the heat of passion.

tated, nor the result of whim and subjective decision-making by the Supreme Court of Georgia. In other like situations, Georgia juries have returned the death penalty as evidenced by the cases not only in the appendix to the decision by the Supreme Court of Georgia in Petitioner's case, but in other cases as well. *See,* Appendix B to this Brief.

In considering the issue of vagueness the Court here is not concerned with the impermissive delegation of policy decisions to juries. *See e.g., Grayned v. City of Rockford,* 408 U.S. 104 (1972). Rather, the vagueness aspect of the limited grant of certiorari in this case is whether the Supreme Court of Georgia has permitted the death penalty to be affirmed in what facially appears to be a standard domestic killing. To the contrary, Petitioner's conduct falls within a well defined class of individuals on whom the death penalty has been imposed for murders which were the result of premeditation. (Appendix C to this Brief). Once you chip away and remove the facade that the murders were the result of nothing more than a domestic disagreement, the heinous nature of Petitioner's crimes becomes apparent. Exposing these murders in their proper light reveals that the affirmation of the death penalty has not been arbitrary. Neither has the upholding of the death penalty to Petitioner been applied to conduct for which fair warning has not been previously given that such actions result in the supreme penalty being meted out. *See, Papachristou v. City of Jacksonville,* 405 U.S. 156, 162 (1972). The Supreme Court of Georgia has consistently interpreted the words "outrageously or wantonly vile, horrible or inhuman" to apply only to cases such as those embodied in this situation to the hard core, or callous and cold-blooded murders. *Harris v. State,* 237 Ga. at 733. *See also,* Appendix C to this Brief, and discussion *infra.*

Petitioner's challenge on the alleged broad interpretation of Ga. Code Ann. § 27-2534.1(b)(7) by the Supreme Court of Georgia must likewise fail, because the cases previously affirmed by the court under the seventh aggravating circumstance clearly

establish that not everyone who murders will receive the death penalty, as this aggravating circumstance is reserved and applied to those limited numbers of murders which are either pre-planned[31] senseless execution style murders, [32] involve excessive torture to the victim,[33] or are evidenced by severe mutilation or disfigurement to the victim.[34] The murders of Mildred Godfrey and her mother, Chessie Wilkerson were planned; they were killed in an execution style manner; and, the weapon used was one capable of causing severe mutilation, and in fact did result in the atrocious disfigurement of both women.

> [T]he severity of the penalty, in the case of a serious offense, is not enough to invalidate it where the nature of the penalty is rationally directed to achieve the legitimate ends of punishment." *Trop v. Dulles,* 356 U.S. 86, 111 (1957), [Justice Brennan concurring.]

The nature of the crime is a prominent consideration in determining whether the sentence imposed has violated the Eighth Amendment. *Coker v. Georgia,* 433 U.S. 584, 598-602 (1977); *Weems v. United States,* 217 U.S. 349, 365-366 (1909). The true nature of Petitioner's crimes places him in the category of people who have generally received the death penalty, and the affirmance of these penalties by the Supreme Court of Georgia has not resulted in too broad an application of the seventh statutory aggravating circumstance of Georgia's 1973 death penalty legislation.

The seventh aggravating circumstance contained in Ga. Code Ann. § 27-2534.1(b)(7), is quite similar or identical to an aggravating circumstance in the Florida death penalty which reads "especially heinous, atrocious, or cruel." Fla. Stat. Ann. § 921.141(5)(b)(c) (Supp. 1976-77). This Court in *Proffitt v.*

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[31] *Smith v. State,* 236 Ga. 12 (1976).
[32] *Banks v. State,* 235 Ga. 121, 218 S.E.2d 851 (1975).
[33] *Birt v. State,* 236 Ga. 815 (1976).
[34] *McCorquodale v. State,* 233 Ga. 369 (1974).

Florida, 428 U.S. 242, 255 (1976), specifically rejected an attack upon the language contained in the Florida statute as being so vague and broad so as to render any defendant in a capital case subject to being a nominee for the death penalty. *Id.* In fact, this Court stated that this wording contained adequate guidance for those who had the responsibility of recommending or imposing a death sentence. *Proffitt v. Florida,* 428 U.S. at 256. Admittedly, at the time this Court considered the Florida death penalty in *Proffitt* the Florida Supreme Court had given some directory language as to its interpretation of Florida's eighth statutory aggravating circumstance which is similar to Georgia's seventh statutory aggravating circumstance. *Proffitt v. Florida,* 428 U.S. at 255. Furthermore, at the time decisions were rendered in *Proffitt* and in *Gregg,* there was only one case in Georgia which involved a sole finding of the seventh statutory aggravating circumstance as noted above, and this Court had no difficulty in agreeing with the State of Georgia that it involved a horrifying torture murder. *Gregg v. Georgia,* 428 U.S. at 201.

The essential or key language in Georgia's seventh aggravating circumstance is "outrageously or wantonly vile, horrible or inhuman." The wording of this seventh aggravating circumstance under Georgia's death penalty enactment is identical in meaning and import to the wording in the Florida death penalty statute of "especially heinous, atrocious, or cruel." Fla. Stat. §§ 921.141 (5) (b) (c), (Supp. 1976-77).

This Court in its plurality opinion in *Gregg,* held that "It is, of course, arguable that any murder involves depravity of mind or an aggravated battery. But this language need not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction." *Id.* at 201 *See also, Proffitt v. Florida,* 428 U.S. at 255. The Supreme Court of Georgia has not permitted the seventh aggravating circumstance to be applied in an open-ended manner, nor has it permitted it to become a "catch-all." In the case of *Banks v. State,* 237 Ga. 325, 227 S.E.2d 380 (1976), this Court

need only look at the concurring opinion by Justice Hall. *Banks* was decided on July 13, 1976, or some ten days after this Court decided *Gregg* and *Proffitt.* In the concurring opinion by Justice Hall in *Banks,* there is evidence that the seventh aggravating circumstance would be given limited construction similar to that which the Florida Supreme Court had adopted in construing its eighth aggravating circumstance which is closely kin to Georgia's seventh aggravating circumstance. Justice Hall in construing the seventh aggravating circumstance in light of *Proffitt* stated, "The same construction can be given in the Georgia statute, and applying that test to the facts in this case (see majority opinion), these two murders were especially outrageous, wantonly vile, horrible, inhuman and manifested exceptional depravity in the manner in which they were executed. In my opinion, this Court has not given Code Ann. § 27-2534.1(b)(7) an open-ended construction. . . . In the words of the Florida Supreme Court, 'the meaning of such terms is a matter of common knowledge, so that an ordinary man would not have to guess at what was intended." (Citation omitted).

In both *Gregg* and *Proffitt* this Court in construing Georgia's seventh aggravating circumstance and Florida's eighth aggravating circumstance stated that the language contained in these sections was capable of being understood by juries.[35]

In October of 1976, the Supreme Court of Georgia gave a further indication as to its interpretation of the words contained in the seventh aggravating circumstance when it decided the case of *Harris v. State,* 237 Ga. 718, 230 S.E.2d 1 (1976).[36] *Harris* involved a wanton killing for thrill in which the jury returned a death penalty only under one statutory aggravating circumstance, that being the seventh aggravating circumstance. In *Harris,* the Supreme Court of Georgia held:

> This aggravating circumstance [the seventh] involves both the effect on the victim, viz., torture, or an aggravated bat-

[35] *Gregg* at p. 202; *Proffit* at pp. 255-256, f.n. 51.

[36] Later reversed for inadequate sentencing instructions. *Harris v. Hopper,* 243 Ga. 244, 253 S.E.2d 707 (1979).

tery; and the offender, viz., depravity of mind. As to both parties the test is that the acts (the offense) were outrageously or wantonly vile, horrible or inhuman.

* * *

Each of these terms used is clearly defined in ordinary dictionaries, Black's Law Dictionary, or Words and Phrases and is subject to understanding and application by a jury. *Harris* at 732.

* * *

We believe that each of these cases establishes beyond any reasonable doubt a depravity of mind and either involved torture or an aggravated battery to the victim as *illustrating* the crimes were outrageously or wantonly vile, horrible or inhuman. Each of these cases is at the core and not the periphery, and we intend to restrict our approval of the death penalty under this statutory aggravating circumstance to those cases that lie at the core. *Id.* at 733. (Emphasis added).

In interpreting the seventh aggravating circumstance the Supreme Court of Georgia as seen in its opinion in *Harris, supra,* has held that the words, "depravity of mind," "torture," or "aggravated battery to the victim," are exemplary words, or put another way are words which are examples of conduct which is outrageous or wantonly vile, horrible or inhuman in which jurors in the past have consistently imposed the supreme punishment upon a defendant in a capital case. The Supreme Court of Georgia has not in its construction of this seventh aggravating circumstance read it in the disjunctive as is argued by the Petitioner. (Brief of Petitioner at p. 23). In the case of *Holton v. State,* 243 Ga. 312, 253 S.E.2d 736 (1979), the Supreme Court of Georgia refutes petitioner's argument that the seventh aggravating circumstance can be applied disjunctively, that is, that this seventh aggravating circumstance can be broken up so that all terms or parts in there are co-equal. In *Holton,* the jury imposed the death penalty under the seventh aggravating circumstance by merely finding that the murder constituted "depravity of mind." *Id.* at p. 318.

> The jury fixed the punishment on both counts of murder as death 'by reason of depravity of mind.' This is only a part of a statutory aggravating circumstance. It omits all reference to the words 'outrageously or wantonly vile, horrible or inhuman.' *Id.* at p. 318.

In *Holton, supra,* the Supreme Court of Georgia specifically rejected applying the seventh aggravating circumstance in the disjunctive, holding that the words "depravity of mind" standing alone would be vague. *Id.* at p. 13. More importantly, is the fact that the Supreme Court of Georgia is again saying that the essential words of the seventh aggravating circumstance are the words "outrageously or wantonly vile, horrible or inhuman," which again gives credence to the conclusion that similar to the words in Florida's eighth statutory aggravating circumstance these words as found by the jury in the Petitioner's case are the required words which need to be found, and the other words such as depravity of mind, aggravated battery or torture are merely illustrative words which exemplify the manner in which the murder was outrageously or wantonly vile, horrible or inhuman.

In the case of *Ruffin v. State,* 243 Ga. 95, 252 S.E.2d 472 (1979), *cert. den.,* December 10, 1979, a case which involved the shotgun killing of an eleven-year-old boy, the jury returned a sentence of death upon finding the existence beyond a reasonable doubt of two statutory aggravating circumstances, one of which was the seventh aggravating circumstance. The jury in writing out its finding held, "By evidence presented to us, we the jurors conclude that this act was both horrible and inhuman. We conclude that Bonnie B. Bulloch, an eleven-year-old defenseless child, was taken by force and arms and was ruthlessly executed on July 26, 1976." The Supreme Court of Georgia found that the jurors' verdict as worded above was sufficient when compiled with its review of the evidence in the case, and the statutory aggravating circumstances which were submitted to the jury for its consideration. *Id.*

The words, "torture, depravity of mind, or an aggravated battery to the victim," are predicate words, or words which affirm or further express what is said of the subject as being adverbial modifiers, words which modify outrageously or wantonly vile, horrible or inhuman. The words, outrageously or wantonly vile, horrible or inhuman are words of common or ordinary everyday usage which need not be defined *per se*. The Supreme Court of Georgia has limited the application of the seventh aggravating circumstance to actual situations which are at the "core and not the periphery" of the seventh aggravating circumstance. *Harris v. State*, 237 Ga. at 733. Thus, the Supreme Court of Georgia has provided a definition as to the outrageous or wantonly vile, horrible or inhuman by setting forth cases which it says are the core and not the periphery of this seventh aggravating circumstance so that future cases will be restricted to those situations which are core cases for outrageously or wantonly vile, horrible or inhuman.

In examining the list of cases to the appendix in *Godfrey* which the Supreme Court of Georgia considered as similar cases, those cases clearly get to the core of the seventh aggravating circumstance. Those cases either involve a premeditated execution style murder, which is present in this case, or contain cases in which there is an anticipation of death to either all or one of the victims as well as severe disfigurement to the victims. *Sub judice*, Chessie Wilkerson anticipated certain death at the hands of the Petitioner when she saw her daughter shotgunned before her eyes, and made a desperate effort to send for help through her eleven-year-old granddaughter, a matter which was to no avail. *See, Floyd v. State*, 233 Ga. 280, 210 S.E.2d 810 (1974). Each of the cases involving anticipation of death, premeditated or execution style homicides, were considered in its review by the Supreme Court of Georgia. Moreover, the Supreme Court of Georgia considered the case of *Banks v. State*, 237 Ga. 325, 227 S.E.2d 380 (1976), which involved a double execution style homicide by use of a shotgun. This case is similar to the *Godfrey* case in terms of execution style murder, use of a shotgun, and the anticipation of

death to one of the murder victims. The cases of *Young v. State*, 239 Ga. 53, 236 S.E.2d 1 (1977); *Peek v. State*, 239 Ga. 422, 238 S.E.2d 12 (1977); *Westbrook v. State*, 242 Ga. 151, 249 S.E.2d 524 (1978); *Finney v. State*, 242 Ga. 582, 250 S.E.2d 388 (1978), are similar in terms of the aggravated injury or battery which the murder victims sustained. In this case both murder victims sustained severe damage to the head area. Specifically, Chessie Wilkerson had the top portion of her skull removed causing blood to be sprayed upon the ceiling and adjacent cabinets.[37] All of the cases cited by the Supreme Court of Georgia in its appendix are similar cases in which the injuries inflicted to the victims are of an aggravated nature, all of which arise to a finding of outrageously and wantonly vile, horrible or inhuman.

Therefore, it cannot be said that a premeditated execution style homicide is not per se outrageous, or that the nature of the killings in this instance is not vile because of the preplanning and actual snuffing out of human life. Neither can it be said that a murder which inflicts serious bodily damage to wit: blowing away a portion of the skull of each victim is not outrageous or wantonly vile or inhuman. In comparing the cases contained in Respondent's Appendix B, to the facts and circumstances in this case, as well as to the cases set forth in the appendix of the review by the Supreme Court of Georgia, it cannot be said that the Supreme Court of Georgia has given the seventh aggravating circumstance such a vague or all encompassing application so as to be violative of the Eighth and Fourteenth Amendments.

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[37] Another case evidencing severe damage to the head following an execution style murder with a shotgun is contained in *Morgan v. State*, 241 Ga. 485, 246 S.E.2d 198 (1978).

III.

THE SUPREME COURT OF GEORGIA HAS NOT GIVEN AN OVERLY BROAD CONSTRUCTION TO THE SEVENTH AGGRAVATING CIRCUMSTANCE IN THE PETITIONER'S CASE, FOR THE PETITIONER'S SENTENCES TO DEATH ARE PROPORTIONATE TO OTHER OFFENDERS WHO HAVE BEEN FOUND GUILTY OF PREMEDITATED MURDER.

The underlying principle in *Furman* which reoccurs in *Gregg, Proffitt,* and *Jurek,* is the concern that the death penalty not be imposed in any one case for any arbitrary, capricious, or penologically improper reason, and that the penalty be imposed from case to case on a similar nonarbitrary, rational and consistent basis. Consistency and proportionality are thus identical in order to prevent and protect against the "freakish" imposition of the death penalty.[38] Consequently, the underlying theme in *Furman, Gregg, Proffitt* and *Jurek* seems to be that there must be some meaningful basis to separate those cases in which the death penalty is applied compared with the majority of cases in which it is not. *Furman,* 408 U.S. at 313 (Opinion of Justice Stewart). In order to advance these aims the Georgia procedure provides clear standards to guide the sentencing body, *Gregg* at 194-95; the findings must be in writing, *Id.;* the instructions during the sentencing phase must be specific enough concerning aggravating and mitigating circumstances, *Gregg* at 166, f.n. 9; and there must be a review mechanism to insure that the death penalty is proportionally applied. *Gregg* at 205.

There can be no question that in capital cases the Eighth Amendment mandates that the sentencing authority give consideration to not only the character and record of the defendant, but to the circumstances of the particular crime, all of which are required in order for due process to be achieved before the death penalty can be inflicted. *Bell v. Ohio,* 438 U.S. 637 (1978);

[38] *Furman,* 408 U.S. at 310.

Woodson v. North Carolina, 428 U.S. 280, 304 (1976). Consequently, in order for the state to take a life there is a requirement that there must be some "reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina,* 428 U.S. at 287. The question in the grant of certiorari concerning whether the Supreme Court of Georgia has given too broad an interpretation of the seventh aggravating circumstance, Ga. Code Ann. § 27-2534.1(b)(7), addresses itself to the proportionality of the Petitioner's sentence in relation to the crimes for which he was convicted.

It is the position of the State of Georgia that the proportionality of the Petitioner's sentences to death must be reviewed not in terms of the killings as "domestic murders," or who the victims were, but as to the motivation and premeditated aspects of the crime. The fact that these crimes involve domestic relationships is merely incidental, and should not be viewed as the controlling factor in determining proportionality of the death sentences in this case,[39] for to do so would mean a judicial intervention of a legislative function which this Court has said would be recognized in death penalty statutes. *Gregg v. Georgia,* 421 U.S. at 181-182.

> The severity of the penalty, in the case of a serious offense, is not enough to invalidate it where the nature of the penalty is rationally directed to achieve the legitimate ends of punishment. *Trop v. Dulles,* 356 U.S. 86, 111 (1957), Justice Brennan concurring.

Juries in Georgia have consistently across the board imposed the death penalty for premeditated murders, murders involving witness elimination, and those where there has not only been premeditation, witness elimination, but where there has been anticipation of death to one of the victims. See, Appendix C to Respondent's Brief.

It was also observed in *Gregg* that '[t]he jury . . . is a sig-

[39] See *United States v. Antelope,* 430 U.S. 641 (1977).

> nificant and reliable index of contemporary values because it is so directly involved. 428 U.S., at 181, 96 S.Ct. at 2929, and that it is thus important to look at the sentencing decisions that juries have made in the course of assessing whether capital punishment is an appropriate penalty for the crime being tried. Of course, the juries' judgment is meaningful only where the jury has an appropriate measure of choice as to whether the death penalty is to be imposed. *Coker v. Georgia,* 433 U.S. 584, 596 (1977).

Petitioner argues that the Supreme Court of Georgia has given an overly broad interpretation to the seventh aggravating circumstance by arguing that the death penalty has not traditionally been imposed in "domestic murder cases." (Brief of Petitioner at p. 43). Petitioner by placing a label on these killings as "domestic murder cases," is in actuality disgusing the true nature of these homicides, which traditionally have resulted in a consistent application by juries in this State in imposing the death penalty. The killings of the Petitioner's wife and mother-in-law are not the result of any sudden flair up, third party love triangle, or of sudden anger brought on and inflamed by alcohol. To the contrary, the uncontradicted evidence in this case establishes that the Petitioner at the time of these killings was sober; that he had been planning these murders for some time; that he showed no remorse in the killings and to some extent was satisfied;[40] that the wounds which were inflicted and the manner in which they were inflicted were intended to be fatal in that both victims were shot in the head at a fairly close range with a shotgun; that between the killings of the wife and the mother-in-law, the mother-in-law being the second victim, that victim must have suffered a great deal of mental anguish in anticipation of certain death since the Petitioner had to reload his shotgun. This evidence clearly shows a callous preplanned execution style murder of two individuals. The fact that they were the Petitioner's wife and mother-in-law should

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[40] *Compare Harris v. State,* 237 Ga. 718 (1976).

not materially effect whether the death sentence is proportionate, for proportionality should be viewed in terms of whether in other similar preplanned execution style murders the death penalty has been invoked. The State of Georgia contends that the record speaks for itself in this regard as evidenced by the list of cases contained in Respondent's Appendix B.

The case of *Dix v. State,* 238 Ga. 209, 232 S.E.2d 147 (1976), specifically held a domestic murder did not mean that the death penalty could not be inflicted even though it frequently was not imposed or sought. *Dix v. State,* 238 Ga. at 216. The *Dix* case is a clear example of a cold-blooded callous murder involving violent and outrageous treatment to the victim. Furthermore, there was no evidence in *Dix* that at the time of the killing he was intoxicated or that the killing arose from an impassioned argument. In fact, there is evidence in *Dix* that the murder was planned by the statement which was made to the victim's mother-in-law, "Don't open that door . . . Your not messing my plans up." *Dix v. State,* at 210.

In another Georgia death penalty case which is domestic in nature, *Smith v. State,* 236 Ga. 12, 222 S.E.2d 308 (1976), the former wife of the victim and her new husband procured the services of another individual to return to Georgia to allure Mrs. Smith's former husband and his new wife into a secluded area so that they could kill them for the purposes of obtaining the proceeds of an insurance policy under which she was the beneficiary of her ex-husband. The area of similarity between *Smith* and the present case is that of premeditation. Similarly, in *Alderman v. State,* 241 Ga. 496, 246 S.E.2d 642 (1978), a case in which the jury returned a death penalty under two statutory aggravating circumstances, one of them being the seventh aggravating circumstance, Alderman was sentenced to death in connection with his premeditated murder plot to kill his wife for insurance proceeds. Once again, the thread of similarity is the premeditated aspect of this murder regardless of the fact it arose out of a domestic relationship.

Petitioner as a special addendum to his brief has attached 104 pages of notes prepared by the Court Administrator under Ga. Code Ann. § 27-2537(e)(f). [Petitioner's Brief at pp. 48, 49]. The thrust of this material is to suggest that the death penalty in a domestic killing is disproportionate. This contention, however, fails to take into consideration plea bargaining,[41] prosecutorial discretion, and the fact that the evidence may not have shown that the murder was premeditated; that the evidence may have shown that the defendant and the victim had been drinking; and, that the killing was spontaneous in terms of occurring in the heat of passion.

Of the forty-five cases cited in this special Addendum,[42] four cases involved child deaths or child abuse.[43] Four cases involved defendants who were intoxicated.[44] In fourteen cases there was no premeditation, that is the killings arose in the heat of the argument.[45] In one instance the jury could not decide as to the sentence, and therefore the trial court imposed a life sentence.[46] In another case the death penalty was not in effect.[47]

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[41] *Brady v. United States,* 397 U.S. 742 (1970).

[42] References to this special Addendum will be cited as S.A., followed by the respective page number in the addendum.

[43] *Proveaux v. State,* 233 Ga. 456, 211 S.E.2d 747 (1974), S.A. 19; *Rampley v. State,* 235 Ga. 101 (1975), S.A. 46; *Staymate v. State,* 237 Ga. 661, 218 S.E.2d 747 (1976), S.A. 85; *Waites v. State,* 238 Ga. 683, 235 S.E.2d 4 (1977), S.A. 102. *See also, Stamper v. State,* 235 Ga. 165, 219 S.E.2d 140 (1975).

[44] *Johnston v. State,* 232 Ga. 268, 206 S.E.2d 468 (1974), S.A. 4; *Brown v. State,* 235 Ga. 806, 18 S.E.2d (1975), S.A.; *Abner v. State,* 233 Ga. 922, 213 S.E.2d 851 (1975), S.A. 22; *Nichols v. State,* 233 Ga. 466, 211 S.E.2d 755 (1974), S.A. 23; *Woods v. State,* 242 Ga. 277 (1978), S.A. 30.

[45] *Johnston v. State, supra,* f.n. 43; *Roosevelt v State,* S.A. 5; *Smith v. State,* 232 Ga. 371, 207 S.E.2d 13 (1974), S.A. 8; *Bonds v. State,* 232 Ga. 694, 208 S.E.2d 561 (1974), S.A. 14; *Abner v. State, supra,* f.n. 43; *Freeman v. State,* 233 Ga. 745, 213 S.E.2d 643 (1975), S.A. 26; *Woods v. State, supra,* f.n. 43; *Shy v. State,* 234 Ga. 816, 218 S.E.2d 599 (1975), S.A. 35; *Adams v. State,* 236 Ga. 468, 224 S.E.2d 32 (1976), S.A. 59; *Flury v. State,* 237 Ga. 273, 227 S.E.2d 325 (1976), S.A. 64; *Little v. State,* 237 Ga. 391, 228 S.E.2d 801 (1976), S.A. 72; *Richardson v. State,*

In another death penalty case involving a domestic killing where the death penalty was imposed, *Blake v. State,* 239 Ga. 292, 236 S.E.2d 637 (1977), *cert. den.,* 434 U.S. 960 (1977), the seventh aggravating circumstance was the only one found. In *Blake,* the defendant and his wife were separated, and defendant in order to get back at his wife threw their two-year-old child off a 100 foot bridge. This too was a premeditated murder, with domestic overtones of revenge against the wife rather than revenge to the wife.

In examining the question of proportionality the nature of the wounds inflicted and the type of weapon used are extremely relevant. In this instance the Petitioner inflicted serious bodily injury to his victims through a shotgun, a weapon which has a wide shot pattern as contrasted with a bullet which is a single missile with a straight trajectory versus the fanning out pattern of a shotgun. In addition to Petitioner's case, there have been six other cases in which the death penalty has resulted where the weapon used was a shotgun.[48] In affirming the death penalty, there have been at least thirty cases which have involved premeditated execution style slayings. (See Appendix C to Respondent's Brief.)

To conclude as Petitioner does that the Supreme Court of Georgia has too broadly construed the seventh aggravating circumstance in upholding his sentences to death for domestic mur-

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237 Ga. 778, 229 S.E.2d 617 (1976), S.A. 88; *Mitchell v. State,* 238 Ga. 420, 233 S.E.2d 173 (1977), S.A. 90; *Cooper v. State,* 238 Ga. 502, 233 S.E.2d 762 (1977).

[46] *Brown v. State,* S.A. 57; *See also, Miller v. State,* 237 Ga. 557, 229 S.E.2d 376 (1976).

[47] *Nichols v. State, supra,* f.n. 43.

[48] *Dobbs v. State,* 236 Ga. 427, 224 S.E.2d 3 (1976); *cert. den.,* 430 U.S. 975, *rehng. den.,* 431 U.S. 960 (1977); *Banks v. State,* 237 Ga. 325, 227 S.E.2d 380 (1976), *cert. den.,* 430 U.S. 975 (1977); *Pryor v. State,* 238 Ga. 698, 234 S.E.2d 918 (1977), *cert. den.,* 434 U.S. 935, *rehng. den.,* 434 U.S. 1003 (1977); *Lamb v. State,* 241 Ga. 10, 243 S.E.2d 59 (1978); *Morgan v. State,* 241 Ga. 485, 246 S.E.2d 198 (1978), *cert. den.,* ____ U.S. ___ (1979); *Ruffin v. State,* 243 Ga. 95, 252 S.E.2d 472 (1979), *cert. den.,* ____ U.S. ____ (December 10, 1979).

ders is to ignore the heinous nature of the crimes for which he has been sentenced to death, crimes which have more often than not resulted in the imposition of the death penalty. The nature of the crime is a prominent consideration in determining whether the sentence violates the Eighth Amendment, but not the relationship of offender to victim as Petitioner argues. *Coker v. Georgia,* 433 U.S. at 58-601, 602; *Weems v. United States,* 217 U.S. at 365-366. In comparison to the challenged punishment in this case with the punishments which have been handed out by other juries in this State, it cannot be said that the Petitioner's sentences are disproportionate, or that the Supreme Court of Georgia has too broadly applied the seventh aggravating circumstance to this case. The Petitioner's sentence to death involves that egregious element calling for the ultimate penalty, which is the fact that the crimes here were preplanned and carried out in a careful and callous manner. Evidence that the Petitioner intentionally intended to inflict grievous bodily harm on his wife and mother-in-law, and that he knew what he was doing in addition to the statement which he gave to the police officers reflecting that, is evidenced in his conduct towards his eleven-year-old daughter whose life he spared. This is significant as it is indicative of the fact that Petitioner knew what he was doing, since he did not seek to harm his child, but sought directly to execute his wife and mother-in-law. While this eleven-year-old child did receive a laceration to her forehead, the evidence suggests that the blow was more of a passing nature to get his daughter out of his way so that she would not interfere with his ultimate plan.

The evidence in this case also authorizes a finding of premeditated murder by Petitioner, since he waited until it was dark before he went to his wife's trailer so that he would not be seen with his shotgun. (T. 175). In the dark the Petitioner could stealthily move about undetected so that his plans could not be disturbed.

The Petitioner's crimes are not crimes of passion, nor are they a crime which occurred because of a domestic argument in a "Saturday night" fight in which either party was intoxicated. The

killings were well thought out, as expressed in the Petitioner's statement that he had been planning it for some time. The choice of the weapon which the Petitioner used also reflects planning. The lack of remorse is significant in showing the Petitioner's mental state at the time of the killings and immediately thereafter. As noted by this Court in the plurality opinion in *Gregg,* 428 U.S. at 201, "It is, of course, arguable that any murder involves depravity of mind or an agravated battery. But this language need not be construed this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction." The State of Georgia submits that the Supreme Court of Georgia has not adopted a broad application to the seventh aggravating circumstance.

The killings in this case while they involve severe dismemberment of the head area to each victim are merely indicative of the intent and utter hatred which accompanied the vendetta which the Petitioner had planned against his unsuspecting wife and mother-in-law. Never to execute a wrongdoer under facts as those which appear in this case, regardless of how vile the actions are is to proclaim that no act is so irredeemably vicious as to deserve death.

> The cold-blooded and callous nature of the offense in this case are the types condemned by death in other cases. *Jarrell v. State,* 234 Ga. 410, 426, 216 S.E.2d 258 (1975), *cert. den.,* 428 U.S. 910, *rehearing den.,* 429 U.S. 873 (1976).

The Petitioner in attempting to reject the death penalty has the burden of showing that his crime does not deserve capital punishment because it is not a case in which a similar penalty has not been consistently applied more often that not by the jurors in the State of Georgia. Respondent submits that this burden has not been carried out, and that to the contrary the facts in this case when compared with the other cases mentioned in this brief unequivocally establish that the Petitioner's sentences to death are proportionate, and that the Supreme Court of Georgia has not adopted such a broad overview in its application of Ga. Code Ann. § 27-2534.1(b)(7) to the facts in this case.

CONCLUSION

Petitioner has not demonstrated that the death penalty provided for under Ga. Code Ann. § 27-2534.1(b)(1) has been given such a broad and vague construction so as to violate his Eighth and Fourteenth Amendment rights. Petitioner has not met his burden of showing that his punishment is disproportionate in similar cases, or that the Supreme Court of Georgia has adopted such an open-ended view of the seventh aggravating circumstance permitting it to become a receptacle for death penalty cases which do not fall within any other statutory aggravating circumstance.

The judgment of the Supreme Court of Georgia should be affirmed.

Respectfully submitted,

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December, 1979.

CERTIFICATE OF SERVICE

I, John W. Dunsmore, Jr., Attorney of Record for the Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have served the foregoing Brief for Respondent on the Petitioner by depositing copies of the same in the United States mail, with first class postage, prepaid, addressed to Counsel of Record at the following post office addresses:

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This ____ day of December, 1979.

_____
JOHN W. DUNSMORE, JR.

APPENDIX

APPENDIX A

1. Statutory Procedures

Ga. Code Ann. § 26-3102 (Supp. 1977).

"26-3102. *Capital offenses; jury verdict and sentence.*—Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstance shall be necessary in offenses of treason or aircraft hijacking. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty." (Ga. Laws 1973, p. 159, 170).

Ga. Code Ann. § 27-2302.

"27-2302. *Recommendation to mercy.*—In all capital cases, other than those of homicide, when the verdict is guilty, with a recommendation to mercy, it shall be legal and shall be a recommendation to the judge of imprisonment for life. Such recommendation shall be binding upon the judge." [Ga. Laws 1974, pp. 352, 353].

Ga. Code Ann. § 27-2503.

"27-2503. *Presentence hearings in felony cases.*—(a) Except in cases in which the death penalty may be imposed, upon the return of a verdict of 'guilty' by the jury in any felony case, the

judge shall dismiss the jury and shall conduct a presentence hearing at which the only issue shall be the determination of punishment to be imposed. In such hearing the judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any prior conviction and pleas; Provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The judge shall also hear argument by the defendant or his counsel and the prosecuting attorney, as provided by law, regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument. In cases in which the death penalty may be imposed, the judge when sitting without a jury shall follow the additional procedure provided in Code section 27-2534.1. Upon the conclusion of the evidence and arguments the judge shall impose the sentence or shall recess the trial for the purpose of taking the sentence to be imposed under advisement. The judge shall fix a sentence within the limits prescribed by law. If the trial court is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment.

"(b) In all cases in which the death penalty may be imposed and which are tried by a jury, upon a return of a verdict of guilty by the jury, the court shall resume the trial and conduct a presentence hearing before the jury. Such hearing shall be conducted in the same manner as presentence hearings conducted before the judge as provided in subsection (a) of this Section. Upon the conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions, and the jury shall retire to determine whether any mitigating or aggravating circumstances, as defined in Code Section 27-2534.1, exist and whether to recommend mercy for the defendant. Upon the findings of the jury, the judge shall fix a sentence within the limits

prescribed by law." (Ga. Laws 1974, pp. 352, 358).

Ga. Code Ann. § 27-2534.1.

"27-2534.1. *Mitigating and aggravating circumstances; death penalty.*—(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

"(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

"(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

"(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

"(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

"(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

"(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

"(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

"(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

"(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

"(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

"(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

"(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in Code section 27-2534.1(b) is so found, the death penalty shall not be imposed." (Ga. Laws 1973, p. 159, 164).

Ga. Code Ann. § 27-2537.

"27-2537. *Review of death sentences.* (a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within ten days after receiving the transcript, shall transmit the entire

record and transcript to the Supreme Court of Georgia together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of Georgia.

"(b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal.

"(c) With regard to the sentence, the court shall determine:

"(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

"(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Code section 27-2534.1(b), and

"(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

"(d) Both the defendant and the State shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

"(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authoized to:

"(1) Affirm the sentence of death; or

"(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the

Supreme Court of Georgia in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

"(f) There shall be an Assistant to the Supreme Court, who shall be an attorney appointed by the Chief Justice of Georgia and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The Assistant shall provide the court with whatever extracted information it desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant.

"(g) The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.

"(h) The office of the Assistant shall be attached to the office of the Clerk of the Supreme Court of Georgia for administrative purposes.

"(i) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence." (Ga. Laws 1973, pp. 159, 164).

Ga. Code Ann. § 70-301 (1975 Supp.):

"Section 16. All applications for new trial, except in extraordinary cases shall be made within thirty (30) days of the entry of the judgment on the verdict, or entry of the judgment where the case was tried without a jury. The motion may be amended any time on or before the ruling thereon, and where the grounds thereof require consideration of the transcript of evidence or proceedings, the court may in its discretion grant an extension

of time, except in cases where the death penalty is imposed, for the preparation and filing of the transcript, which may be done any time on or before the hearing, or the court may in its discretion hear and determine the motion before the transcript of evidence and proceedings is prepared and filed. The grounds of the motion need not be approved by the court. The motion may be heard in vacation or term time, but where not heard at the time named in the order, whether in term time or vacation, it shall stand for hearing at the next term or at such other time in term or vacation as the court by order at any time may prescribe, unless sooner disposed of. Motions for new trial in cases in which the death penalty is imposed shall be given priority. On appeal, a party shall not be limited to the grounds urged in the motion, or any amendment thereof. The court also shall be empowered to grant a new trial on its own motion within thirty (30) days from entry of the judgment, except in criminal cases where the defendant was acquitted." (Ga. Laws 1973, pp. 159, 168).

Severability Clause in 1973 Act:

"Section 10. In the event any section, subsection, sentence, clause or phrase of this Act shall be declared or adjudged invalid or unconstitutional, such adjudication shall in no manner affect the other sections, subsections, sentences, clauses, or phrases of this Act, which shall remain of full force and effect, as if the section, subsection, sentence, clause or phrase so declared or adjudged invalid or unconstitutional were not originally a part hereof. The General Assembly hereby declares that it would have passed the remaining parts of this Act if it had known that such part or parts hereof would be declared or adjudged invalid or unconstitutional." (Ga. Laws 1973, pp. 159, 172).

Effective Date, 1973 Act:

"Section 11. This Act shall become effective upon its approval by the Governor or upon its becoming law without his approval. The Supreme Court may suspend consideration of death penalty

cases until January 1, 1974, or such earlier times as the court determines it is prepared to make the comparisons required under the provisions of this Act." (Ga. Laws 1973, pp. 159, 172).

Repealer, 1973 Act:

"Section 12. All laws and parts of laws in conflict with this Act are hereby repealed. Approved March 28, 1973." (Ga. Laws 1973, pp. 159, 172).

2. Georgia's Murder Statute

Ga. Code Ann. § 26-1101 (1972 Rev.)

"26-1101. *Murder.*—(a) A person commits murder when he unlawfully and with malice aforethought either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abondoned and malignant heart.

"(b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.

"(c) A person convicted of murder shall be punished by death or by imprisonment for life." (Ga. Laws 1968, pp. 1249, 1276).

APPENDIX B

COMPENDIUM OF GEORGIA DEATH PENALTY CASES

NAME	CITE		AGGRAVATING CIRCUMSTANCE 1/	FACTS
COLEY	231 Ga. 829, 204 S.E.2d 612 (1974)	Conviction aff'd.; sentence reversed		Armed robbery; rape - victim did not die
HOUSE	232 Ga. 140, 205 S.E.2d 217 (1974), cert. den., 428 U.S. 915, rehng. den., 429 U.S. 873 (1976)	Aff'd.	2-7	sodomy - choked to death
EBERHEART	232 Ga. 247, 206 S.E.2d 12 (1974), cert. den., 433 U.S. 917 (1976), sentence vacated	Aff'd.	2	Kidnapping; rape - victim did not die
GREGG	233 Ga. 117, 210 S.E.2d 659 (1974), aff'd., 428 U.S. 153, rehng. den., 429 U.S. 875 (1976)	Aff'd.	2-4	robbery; shooting

1/ Refers to statutory aggravating circumstance under Ga. Code Ann. § 27-2534.1(b)

NAME	CITE		AGGRAVATING CIRCUMSTANCE	FACTS
ROSS	233 Ga. 361, 211 S.E.2d 356 (1974), cert. den., 428 U.S. 910, rehng. den., 429 U.S. 873 (1976)	Aff'd.	2-8	robbery-shot cop
HOOKS	233 Ga. 149, 210 S.E.2d 668 (1974), cert. granted, 433 U.S. 917 (1977), sentence vacated	Aff'd.	7	rape - no murder
McCORQUODALE	233 Ga. 369, 211 S.E.2d 577 (1974), cert. den., 428 U.S. 910, rehng. den., 429 U.S. 873 (1976)	Aff'd.	2-7	rape - strangulation & torture
MOORE	233 Ga. 861, 213 S.E.2d 829 (1974), cert. den., 428 U.S. 910, rehng. den., 429 U.S. 873 (1976)	Aff'd.	2	robbery-shooting
FLOYD	233 Ga. 280, 210 S.E.2d 810 (1974), cert. den., 431 U.S. 949, rehng. den., 434 U.S. 882 (1977)	Aff'd.	2-7	robbery-shooting

NAME	CITE		AGGRAVATING CIRCUMSTANCE	FACTS
STACK	234 Ga. 19, 214 S.E.2d 514 (1975)	Conviction and sentence reversed		Stabbing
OWENS	233 Ga. 869, 214 S.E.2d 173 (1975)	Conviction aff'd.; sentence reversed		Stabbing
PREVATTE	233 Ga. 929, 214 S.E.2d 365 (1975)	Conviction aff'd.; sentence reversed		Not stated
JORDAN	233 Ga. 929, 214 S.E.2d 365 (1975)	Conviction aff'd.; sentence reversed		Not stated
JARRELL	234 Ga. 410, 216 S.E.2d 258 (1975)	Aff'd; one death penalty reversed	2-3-4-7	Kidnapping; robbery; shooting
MITCHELL	234 Ga. 160, 214 S.E.2d 900 (1975), cert. den., 428 U.S. 910, rehng. den., 429 U.S. 874 (1976)	Aff'd.	2	Robbery; shooting
CHENAULT	234 Ga. 216, 215 S.E.2d 223 (1975), cert. den., 434 U.S. 878, rehng. den., 434 U.S. 976 (1977)	Aff'd.	3	Open shooting in church

NAME	CITE		AGGRAVATING CIRCUMSTANCE	FACTS
COKER	234 Ga. 555, 216 S.E.2d 782 (1975)	Aff'd.	1-2	Rape; robbery; kidnapping; no murder
TAMPLIN	235 Ga. 20, 218 S.E.2d 779 (1975)	Aff'd. conviction; sentence reversed		Robbery; shooting
BANKS	235 Ga. 121, 218 S.E.2d 851 (1975)	judgment reversed		Shotgun shooting
BERRYHILL	235 Ga. 549, 221 S.E.2d 185 (1975), cert. den., 429 U.S. 1054, rehng. den., 430 U.S. 911 (1977)	Aff'd.	2	Robbery; shooting
SMITH (JOHN)	236 Ga. 12, 222 S.E.2d 308 (1976), cert. den., 428 U.S. 910, rehng. den., 429 U.S. 874 (1976)	Aff'd.	4	Shooting for insurance benefits
SMITH (REBECCA)	236 Ga. 12, 222 S.E.2d 308 (1976), cert. den., 429 U.S. 932, rehng. den., 429 U.S. 1055 (1977)	Aff'd.	4	Shooting for insurance benefits

NAME	CITE		AGGRAVATING CIRCUMSTANCE	FACTS
BARROW	235 Ga. 635, 221 S.E.2d 416 (1975)	judgment reversed		Robbery; shooting
MASON	236 Ga. 46, 222 S.E.2d 339 (1976), cert. den., 428 U.S. 910, rehng. den., 429 U.S. 874 (1976)	Aff'd.	1	Shooting of girlfriend
BROWN	235 Ga. 644, 220 S.E.2d 922 (1975)	Aff'd. conviction; reversed sentence		Robbery; shooting
DOBBS	236 Ga. 427, 224 S.E.2d 3 (1976), cert. den., 430 U.S. 975, rehng. den., 431 U.S. 960 (1977)	Aff'd.	2	Robbery; shotgun shooting
COLEMAN	237 Ga. 84, 226 S.E.2d 911 (1976), cert. den., 431 U.S. 909, rehng. den., 431 U.S. 961 (1977)	Aff'd.	2	Multiple execution
ARNOLD	236 Ga. 534, 224 S.E.2d 386 (1976)	Aff'd., conviction; sentence reversed	1	Robbery; shooting

NAME	CITE		AGGRAVATING CIRCUMSTANCE	FACTS
GOODWIN	236 Ga. 339, 223 S.E.2d 703 (1976), cert. den., 431 U.S. 909, rehng. den., 432 U.S. 911 (1977)	Aff'd.	2	Robbery; shooting
PULLIAM	236 Ga. 460, 224 S.E.2d 8 (1976), cert. den., 428 U.S. 911, rehng. den., 429 U.S. 874 (1976)	Aff'd.	2-4	Shooting of cab driver
SPENCER	236 Ga. 697, 224 S.E.2d 910 (1976), cert. den., 429 U.S. 932, rehng. den., 429 U.S. 1055 (1977)	Aff'd.	1-9-10	Shooting of deputy while escaping
DAVIS	236 Ga. 804, 225 S.E.2d 241 (1976), reversed, 429 U.S. 122 (1976)	Aff'd.	1-2-7	Robbery; beating; shooting
BIRT	236 Ga. 815, 225 S.E.2d 248 (1976), cert. den., 429 U.S. 1029 (1976)	Aff'd.	2-4-7	Robbery; strangulation
STREET	237 Ga. 307, 227 S.E.2d 750 (1976), reversed in part, 429 U.S. 995 (1976)	Aff'd.	2	Stabbing; drowning

NAME	CITE		AGGRAVATING CIRCUMSTANCE	FACTS
GIBSON	236 Ga. 874, 226 S.E.2d 63 (1976), cert. den., 429 U.S. 986, rehng. den., 429 U.S. 1124 (1977)	Aff'd.	2	Rape; shooting
STEPHENS	237 Ga. 259, 227 S.E.2d 261 (1976), cert. den., 429 U.S. 986, rehng. den., 429 U.S. 1067 (1977)	Aff'd.	1-9	Robbery; shooting
ISSACS	237 Ga. 105, 226 S.E.2d 922 (1976), cert. den., 429 U.S. 986 (1976)	Aff'd.	2	Multiple, execution style
BANKS	237 Ga. 325, 227 S.E.2d 380 (1976), cert. den., 430 U.S. 975 (1977)	Aff'd.	7	Shotgun shooting
DUNGEE	237 Ga. 218, 227 S.E.2d 746 (1976), cert. den., 429 U.S. 986 (1976)	Aff'd.	2	Multiple, execution style
HARRIS	237 Ga. 718, 230 S.E.2d 1 (1976), cert. den., 431 U.S. 933, rehng. den., 434 U.S. 882 (1977)	Aff'd.	7	Shooting in head

NAME	CITE		AGGRAVATING CIRCUMSTANCE	FACTS
DORSEY	237 Ga. 876, 230 S.E.2d 307 (1976)	judgment reversed	former conviction in federal court barred this action	Bank robbery & shooting of hostage
HILL	237 Ga. 794, 229 S.E.2d 737 (1976)	Aff'd.	1-7	Robbery; stabbing to death
YOUNG	237 Ga. 852, 230 S.E.2d 287 (1976)	Aff'd.	2-4	Shooting of bank president
DIX	238 Ga. 209, 232 S.E.2d 47 (1977)	Aff'd.	7	Beating; stabbing; strangled wife
DOUTHIT	239 Ga. 8, 235 S.E.2d 493 (1977), application for stay, 436 U.S. 923 (1978)	Aff'd.	4	Shooting for insurance benefits
PRYOR	238 Ga. 698, 234 S.E.2d 918 (1977), cert. den., 431 U.S. 935, rehng. den., 434 U.S. 1003 (1977)	Aff'd.	2	Kidnapping; shotgun shooting
GADDIS	239 Ga. 238, 236 S.E.2d 594 (1977), cert. den., 434 U.S. 1088, rehng. den., 435 U.S. 981 (1978)	Aff'd.	2-4-7	Robbery; strangulation

NAME	CITE		AGGRAVATING CIRCUMSTANCE	FACTS
BLAKE	239 Ga. 292, 236 S.E.2d 637 (1977), cert. den., 434 U.S. 960 (1977)	Aff'd.	7	Threw baby off bridge
YOUNG	239 Ga. 53, 236 S.E.2d 1 (1977), cert. den., 434 U.S. 1002, rehng. den., 434 U.S. 1051 (1977)	Aff'd.	2-7	Burglary; beating to death
WARD	239 Ga. 205, 236 S.E.2d 365 (1977)	Aff'd. conviction; reversed sentence	7 previous trial ended in life sentence	Stabbing
PEEK	239 Ga. 422, 238 S.E.2d 12 (1977), cert. den. ___ U.S. ___, 99 S.Ct. 218 (1978)	Aff'd	2	Rape; beating to death
BOWDEN	239 Ga. 821, 238 S.E.2d 905 (1977), cert. den., 435 U.S. 937 (1978)	Aff'd	2	Robbery; beating to death
HAWES	239 Ga. 630, 238 S.E.2d 418 (1977)	Aff'd. conviction; reversed sentence		Robbery; shooting
CORN	240 Ga. 130, 240 S.E.2d 694 (1977), cert. den., 436 U.S. 914, rehng. den., 438 U.S. 908 (1978)	Aff'd.	2-4-7	Robbery; stabbing

NAME	CITE		AGGRAVATING CIRCUMSTANCE	FACTS
THOMAS	240 Ga. 296, 240 S.E.2d 87 (1977), cert. den., 436 U.S. 914, rehng. den., 438 U.S. 908 (1978)	Aff'd.	2-4-7	Robbery; beating buried alive
STANLEY	240 Ga. 341, 241 S.E.2d 173 (1977), cert. den., ___ U.S. ___, 58 L.Ed.2d 94 (1978)	Aff'd.	2-7	Robbery; beating; buried alive
FLEMING	240 Ga. 142, 240 S.E.2d 828 (1977)	Conviction aff'd.; sentence reversed		Robbery; shooting of police chief
CAMPBELL	240 Ga. 352, 240 S.E.2d 828 (1977), cert. den., ___ U.S. ___, 58 L.Ed.2d 194 (1978)	Aff'd.	2-7	Robbery; beating to death
SPRAGGINS	240 Ga. 759, 243 S.E.2d 20 (1978)	Conviction aff'd.; sentence reversed		Rape, stabbing; mutilation
DAVIS	240 Ga. 763, 243 S.E.2d 12 (1978)	Conviction aff'd.; sentence reversed		Rape; stabbing; mutilation
REDD	240 Ga. 753, 242 S.E.2d 628 (1978)	Conviction aff'd.; sentence reversed		Robbery; beating

NAME	CITE		AGGRAVATING CIRCUMSTANCE	FACTS
MOORE	240 Ga. 807, 243 S.E.2d 1 (1978), cert. den., ___ U.S. ___, 99 S.Ct. 268 (1978)	Aff'd.	2	Robbery; shooting
POTTS	241 Ga. 67, 243 S.E.2d 510 (1978)	Aff'd.	2	Kidnapping; shooting
PRESNELL	241 Ga. 49, 243 S.E.2d 496 (1978), Opinion of Ga. S.Ct. vacated, ___ U.S. ___, 99 S.Ct. 235 (1978). 243 Ga. 131, 252 S.E.2d 625 (19), cert. den., ___ U.S. ___, 62 L.Ed.2d 115 (1979)	Aff'd.	2	Rape; drowning
LAMB	241 Ga. 10, 243 S.E.2d 59 (1978)	Aff'd. conviction		Unprovoked shotgun shooting
DAVIS	241 Ga. 376, 247 S.E.2d 45 (1978), cert. den., 429 U.S. 122 (1978)	Aff'd.	1-7	Robbery; beating; shooting
MORGAN	241 Ga. 485, 246 S.E.2d 198 (1978), cert. den., ___ U.S. ___, 99 S.Ct. 2418, rehng. den., Nov. 26, 1979).	Aff'd.	7	Robbery; shotgun shooting

NAME	CITE		AGGRAVATING CIRCUMSTANCE	FACTS
HALL	241 Ga. 252, 244 S.E.2d 833 (1978)	Conviction aff'd.; sentence reversed	co-defendant triggerman received life sentence	Shooting during robbery
SPIVEY	241 Ga. 477, 246 S.E.2d 288 (1978), cert. den., ___ U.S. ___, 99 S.Ct. 2418 (1979)	Aff'd.	2	Robbery; shooting
POTTS	241 Ga. 67, 243 S.E.2d 510 (1978)	Aff'd.	2	Kidnapping; shooting
ALDERMAN	241 Ga. 496, 246 S.E.2d 642 (1978), cert. den., ___ U.S. ___, 99 S.Ct. 593 (1979)	Aff'd.	4-7	Beating for insurance benefits
GRIGGS	241 Ga. 317, 245 S.E.2d 269 (1978)	Conviction aff'd.; sentence reversed		Rape; stabbing; strangulation
DRAKE	241 Ga. 583, 247 S.E.2d 57 (1978), cert. den., ___ U.S. ___, 99 S.Ct. 1265 (1978)	Aff'd.	2-7	Robbery; beating
BOWEN	241 Ga. 492, 246 S.E.2d 322 (1978)	Conviction aff'd.; sentence reversed		Rape; stabbing
WESTBROOK	242 Ga. 151, 249 S.E.2d 524 (1978), cert. den., ___ U.S. ___, 99 S.Ct. 881 (1979)	Aff'd.	2-7	Rape; beating to death

NAME	CITE		AGGRAVATING CIRCUMSTANCE	FACTS
GREEN	242 Ga. 261, 249 S.E.2d 1 (1978), vacated as to sentence, ___ U.S. ___, 99 S.Ct. 2150 (1979). 244 Ga. 27 (1979).	Aff'd.	2-7	Kidnapping; shooting
JOHNSON	242 Ga. 649, 250 S.E.2d 394 (1978)	Aff'd.	7	Kidnapping; rape; execution
FINNEY	242 Ga. 582, 250 S.E.2d 288 (1978), cert. den., ___ U.S. ___, 99 S.Ct. 2017 (1979)	Aff'd.	2-7	Rape; beating
BURGER	242 Ga. 28, 247 S.E.2d 834 (1978)	Conviction aff'd.; sentence reversed		Robbery; rape; drowning
STEVENS	242 Ga. 34, 247 S.E.2d 838 (1978)	Conviction aff'd; sentence reversed		Robbery; rape; drowning
RUFFIN	243 Ga. 95, 252 S.E.2d 472 (1979), cert. den., ___ U.S. ___, Dec. 10, 1979)	Aff'd.	2-7	Robbery; execution style; shotgun shooting
COLLINS	243 Ga. 291, 253 S.E.2d 729 (1979), cert. pending	Aff'd.	2-7	Robbery; beating
REDD	242 Ga. 876, 252 S.E.2d 383 (1979)	Aff'd.	2-7	Robbery; beating

NAME	CITE		AGGRAVATING CIRCUMSTANCE	FACTS
WILLIS	243 Ga. 185, 253 S.E.2d 70 (1979), cert. den., ___ U.S. ___, 62 L.Ed.2d 116 (1979)	Aff'd.	7-8-10	Robbery; shot cop
FLEMING	243 Ga. 120, 252 S.E.2d 609 (1979), cert. den., ___ U.S. ___, 62 L.Ed.2d 115 (1979)	Aff'd.	2-5	Robbery, shot cop
DAVIS	242 Ga. 901, 252 S.E.2d 443 (1979), cert. pending	Aff'd.	2-7	Rape; stabbing; multilation
SPROUSE	243 Ga. 831 (1979)	Aff'd. conviction; reversed sentence		Kidnapping;rape; execution style shooting
GODFREY	243 Ga. 302, 253 S.E.2d 710 (1979), cert. granted, ___ U.S. ___, 62 L.Ed.2d 133 (1979)	Aff'd.	7	Shotgun shooting of wife and mother-in-law
HOLTON	243 Ga. 312, 253 S.E.2d 736 (1979)	Aff'd. conviction; sentence reversed	7 found depravity of mind but didn't use essential statutory language of aggravating circumstance	Robbery;stabbing

NAME	CITE		AGGRAVATING CIRCUMSTANCE	FACTS
SPRAGGINS	243 Ga. 73, 252 S.E.2d 620 (1979), cert. pending	Aff'd.	7	Rape; stabbing; mutilation
AMADEO	243 Ga. 627, 255 S.E.2d 718 (1979), cert. den., Nov. 1979	Aff'd.	2	Robbery;shooting
LEGARE	243 Ga. 744 (1979), cert. den. Dec. 1979.	Aff'd.	2-7	Robbery; beating to death
BAKER	243 Ga. 710, 257 S.E.2d 192 (1979), cert. pending.	Aff'd.	2-7	Robbery; shooting
JONES	243 Ga. 820 (1979), cert. pending.	Aff'd.	2-3	Robbery; shooting
HAMILTON	244 Ga. 145 (1979)	Aff'd.	2-7	Robbery, beating stabbing
COLLIER	___ Ga. ___, Decided Oct. 31, 1979	Aff'd.	2-8-10	Robbery; killing of police officer, resisting arrest
COBB	244 Ga. 344 (1979)	Sentence reversed		Robbery; murder
GATES	___ Ga. ___ (Decided Oct. 24, 1979)	Aff'd.	2-7[2/]	Rape; murder; robbery

2/ Reversed as to seventh statutory aggravating circumstance.

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NAME	CITE		AGGRAVATING CIRCUMSTANCE	FACTS
TUCKER	Ga. (Decided Nov. 21, 1979)	Aff'd.	2	Murder; kidnapping with bodily injury; aggravated sodomy

APPENDIX C

GEORGIA DEATH PENALTY CASES INVOLVING PREMEDITATED MURDER

Moore v. State, 233 Ga. 861, 213 S.E.2d 829 (1974)
Gregg v. State, 233 Ga. 117, 210 S.E.2d 659 (1974)
Chenault v. State, 234 Ga. 216, 215 S.E.2d 233 (1975)
Smith v. State, 236 Ga. 12, 222 S.E.2d 308 (1976)
Dix v. State, 238 Ga. 209, 232 S.E.2d 47 (1976)
Blake v. State, 239 Ga. 292, 236 S.E.2d 637 (1977)
Douthit v. State, 239 Ga. 81, 235 S.E.2d 493 (1977)
Young v. State, 239 Ga. 53, 236 S.E.2d 1 (1977)
Bowden v. State, 239 Ga. 821, 238 S.E.2d 905 (1977)
Thomas v. State, 240 Ga. 393, 240 S.E.2d 87 (1977)
Stanley v. State, 240 Ga. 341, 241 S.E.2d 173 (1977)
Pryor v. State, 238 Ga. 698, 234 S.E.2d 918 (1977)
Peek v. State, 239 Ga. 422, 238 S.E.2d 12 (1977)
Redd v. State, 240 Ga. 753, 242 S.E.2d 628 (1978)
Potts v. State, 241 Ga. 67, 243 S.E.2d 510 (1978)
Lamb v. State, 241 Ga. 10, 243 S.E.2d 59 (1978)
Morgan v. State, 241 Ga. 485, 246 S.E.2d 198 (1978)
Alderman v. State, 241 Ga. 496, 246 S.E.2d 642 (1978)
Westbrook v. State, 242 Ga. 151, 249 S.E.2d 524 (1978)
Green v. State, 242 Ga. 261, 249 S.E.2d 1 (1978)
Moore v. State, 240 Ga. 807, 243 S.E.2d 1 (1978)
Johnson v. State, 242 Ga. 649, 250 S.E.2d 394 (1978)
Sprouse v. State, 242 Ga. 831, 252 S.E.2d 173 (1979)
Hamilton v. State, 244 Ga. 145, ____ S.E.2d ____ (1979)
Ruffin v. State, 243 Ga. 95, 252 S.E.2d 472 (1979)
Collins v. State, 243 Ga. 291, 253 S.E.2d 729 (1979)
Spraggins v. State, 240 Ga. 759, 243 S.E.2d 20 (1978)
Davis v. State, 240 Ga. 763, 243 S.E.2d 12 (1978)
Baker v. State, 243 Ga. 710, 257 S.E.2d 192 (1979)
Collier v. State, ____ Ga. ____ (Case No. 35063, Decided Oct. 30, 1979)